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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 449

MARDEN & MURPHY, INC.,

Appellant,

vs.

CITY OF LOWELL,

Appellee

STATEMENT AS TO JURISDICTION ON APPEAL

Now comes the appellant, Marden & Murphy, Inc., in the above entitled cause (respondent below) and in support of the jurisdiction of this Court to review said cause on appeal respectfully represents.

I

Statutory Provision Sustaining Jurisdiction

This appeal is claimed under the provisions of the Judicial Code, Section 237(a), as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 937; 28 U. S. C., Section 344(a); because there is drawn in question in this cause the validity of a statute of the Commonwealth of Massachusetts on the ground of its being repugnant to the

Fourteenth Amendment to the Constitution of the United States, and the decision is in favor of its validity.

II

The Massachusetts Statute the Validity of Which Is Involved

The Massachusetts statute which is drawn in question is Chapter 478 of the Acts of 1938, amending General Laws (Ter. Ed.), Chapter 59, dealing with proceedings by the taxpayer to secure abatement of assessments claimed to be excessive or illegal. This statute, which became effective July 1, 1938, as applied to any case where the tax on a parcel of real estate was more than $1,000, required the taxpayer, before he could appeal from the refusal or failure of the Assessors to grant an abatement—in other words before he could obtain *any hearing*, other than by the assessing board itself, as to the validity and amount of his tax, either (1) to pay (substantially) the entire tax as assessed or (2) to pay (substantially) one-half the tax and to show to the satisfaction of the Appellate Tax Board that he was unable presently to pay the balance. It mattered not whether questions of law or even questions of constitutional right might be involved; and it mattered not whether the taxpayer had the necessary funds to make the payment. Unless the payment was made, the taxpayer was denied any hearing.[1]

III

Date of Decree and Date of Application for Appeal

The case was tried in the Land Court for the County of Middlesex and Commonwealth of Massachusetts, and following the decision of that Court, which was rendered March 29, 1946, the case was appealed by both petitioner

[1] This statute, St. 1938, c. 478, (except section 4, not here material), is set out in full in an appendix to this statement.

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and respondent to the Supreme Judicial Court of Massachusetts.

The opinion of said Supreme Judicial Court of Massachusetts was handed down September 11, 1947, and a rescript was filed on said date in said Land Court embodying an order "that the Recorder of said Court in said County make the following entry under said case in the docket of said Court viz.—Decision Affirmed."

The final decree of the Land Court entered pursuant to said rescript was entered on October 23, 1947.

The application for appeal was presented on the 23rd day of October, 1947.

IV

Nature of the Case and Ruling Below

Express Ruling by the Massachusetts Court Held the Statute Valid

The Land Court of Massachusetts held that this statute *did not violate the Appellant's rights under the Fourteenth Amendment* (R. 30),[2] and on the appeal to the Supreme Judicial Court of Massachusetts the decision of the Land Court was *affirmed,* and the statute was expressly held to be constitutional. The Court said: (at page 2 of copy of opinion hereto annexed)

> "By St. 1938, c. 478, s. 3 (G. L. (Ter. Ed.) c. 59, s. 65B), where a tax on a parcel of real estate exceeds $1,000, a payment, generally of half the tax, must be made as a condition of appeal to the Appellate Tax Board. It is settled that such a payment may constitutionally be made a condition of a hearing upon an application or an appeal for abatement, *regardless of the financial condition of the taxpayer, Old Colony Railroad* v. *Assessors of Boston,* 309 Mass. 439. *Lincoln*

[2] References unless otherwise specified are to the printed record in the State Court.

> *Hotel Co.* v. *Assessors of Boston*, 317 Mass. 505. We remain satisfied with those decisions, which are decisive as to the present objection raised by the respondent." (Italics ours.)

Both cases cited by the Court involved the same statute, which is in issue here, namely, St. 1938, c. 478. In the *Old Colony Railroad* case the taxpayer's objections under the due process and equal protection clauses were both expressly considered (pp. 446, 450), and the statute was held valid. In the *Lincoln Hotel Company* case the taxpayer expressly requested a ruling that the statute requiring payment before appeal violated the due process and the equal protection clauses of the Fourteenth Amendment (p. 506) but the Court again held the statute valid.

The decision of the Massachusetts Court in the present case, therefore, necessarily held that the statute was not repugnant to the Fourteenth Amendment.

Without searching the record further, appellant submits that this express decision by the State Court is sufficient to establish the jurisdiction of the Supreme Court of the United States on this appeal.

In *Charleston Association* v. *Alderson*, 324 U. S. 182, 185-186, this Court said:

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the Court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised where such question appears to have been actually considered and decided by that court."

The record, however, shows that the issue of denial of constitutional right by this restrictive statute was clearly raised.

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Validity of the Statute Was Clearly in Issue

This case is a proceeding by the City of Lowell in the Land Court of Massachusetts to foreclose the liens claimed by it under four tax takings made by the Collector of Taxes of the City of Lowell, all dated August 17, 1942, purporting to take the lands of the respondent Marden & Murphy, Inc. therein described, for taxes assessed against the respondent for the years 1933 to 1941 inclusive.

In order to appreciate fully the extent to which this statute infringed upon the taxpayer's rights it is necessary to consider briefly the method provided by the Massachusetts law whereby the taxpayer may obtain a review of assessments on his real estate, and the effect of the statute complained of on the statutes as they previously existed.

Abatement Proceedings Under Statute Are the Taxpayer's Sole Recourse

Proceedings for abatement in Massachusetts are governed wholly by statute. Before discussing the provisions themselves we should note that the Massachusetts Court has held in many cases that these statutory proceedings for abatement are the *only* remedy available to the taxpayer to obtain reduction of assessments claimed to be excessive or invalid.

Old Colony Railroad Co. v. *Assessors of Boston*, 309 Mass. 439, 442 (1941);

Wynn v. *Assessors*, 281 Mass. 245, 248 (1932);

Central National Bank v. *Lynn*, 259 Mass. 1, 6-7 (1927), 266 Mass. 145 (1929).

The Land Court expressly so held in this case (R. 26) and on the appeal the Supreme Judicial Court again ex-

pressly stated the same rule when it said (pp. 1-2 of copy of opinion annexed):

> "If the inclusion of the value of the water power was wrong, the only remedy of the respondent was by a petition for abatement."

In *Eastern Racing Association* v. *Revere*, 300 Mass. 578 (1938) the Court said Dolan, J., pp. 581-582,

> "In creating what is now the Appellate Tax Board, it was the clear intention of the legislature to establish a *comprehensive system* whereby *all appeals* from the actions of taxing authorities of the Commonwealth and its municipalities *should be heard and determined by that Board.*" (Italics ours.)

In *Hayward* v. *Assessors of Boston*, 304 Mass. 355 (1939) where the Appellate Tax Board had declined to accept an appeal from a Board of Assessors on the ground that no part of the tax had been paid, the Supreme Judicial Court of Massachusetts held that it was without jurisdiction to consider an appeal from that decision of the Board on the ground that the Board's decision was not a decision "upon an appeal" from the Board of Assessors but was merely a decision that such an appeal could not be filed. The Court said at page 357

> "The petitioner's right of appeal from the board to this court is necessarily bounded by the statute governing such appeals. He has no extra-statutory and anomalous rights of appeal."

The Statutory Provisions as They Existed Before St. 1938, c. 478

The provisions governing proceedings for abatement are found in the General Laws of Massachusetts (Ter. Ed.) Chapter 59. In Section 59 of that chapter it is provided that "a person aggrieved by the tax assessed upon him

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may . . . on or before October first of the year to which the tax relates . . . apply in writing to the Assessors, on a form approved by the Commissioner, for an abatement thereof." Later sections give certain rights of appeal if the Assessors refuse or fail to grant satisfactory abatement.

Before the enactment of St. 1938, Chapter 478, the taxpayer was free to appeal either to the County Commissioners or to the Appellate Tax Board within sixty days after notice of the Assessors' decision. If the Assessors failed to act upon the application prior to the expiration of four months from the date it was filed, it was deemed to be refused, and the appeal, either to the County Commissioners or to the Appellate Tax Board, must be filed within ninety days thereafter. The appeal to the County Commissioners was governed by G. L. (Ter. Ed.) c. 59, s. 64 as this section then read. It had been amended a number of times but is set out in its then form in St. 1937, c. 400, s. 6. The appeal to the Appellate Tax Board was governed by G. L. (Ter. Ed.) c. 59, s. 65. As it then stood, this section is found in St. 1933, c. 167, s. 1.

The right of appeal, either to the County Commissioners or to the Appellate Tax Board, was *free* and *unqualified*. There was *no condition precedent*. It is not questioned but that these remedies were fair and adequate.

The Statute Complained of (St. 1938, c. 478)

The statute complained of, however, St. 1938, c. 478, which became effective July 1, 1938, introduced drastic limitations.[3]

By Section 1 of said St. 1938, c. 478, s. 64 of said Chapter 59 was amended by inserting as a condition precedent to

[3] In this statute as set out in the appendix to this statement, the material language which was inserted by it in G. L. (Ter. Ed.), c. 59, s. 64 and s. 65 is indicated in italics. The new section 65B is of course set out in full.

an appeal from the Board of Assessors to the County Commissioners that the taxpayer, where his tax is more than $1,000 on a parcel of real estate, must have paid the *entire* tax or under an alternative provision an amount *approximating* the entire tax. It also inserted an express provision that if the Assessors did not act upon the application for abatement within the four months from date it was filed, they should have no further authority to act thereon, except that during the further ninety day period allowed for appeal, they could agree with the applicant in final settlement of his application, or they could grant abatement as to any tax "as to which an appeal has been seasonably taken."

By Section 2 of said St. 1938, c. 478, s. 65 of said Chapter 59 was amended by inserting the same condition precedent to an appeal to the Appellate Tax Board, namely, that the entire tax or an amount approximating the entire tax must be paid before appeal could be taken.

Section 3 of said St. 1938, c. 478 introduced a *new section* to be designated Section 65B of said G. L. (Ter. Ed.) c. 59. By this section the taxpayer whose tax exceeded $1,000 on a parcel of real estate was permitted, *after he had paid one-half* the amount required under the previous section, to *petition* the Appellate Tax Board *for leave to file an appeal,* and if he could show to the satisfaction of the Board that he was unable presently to pay the balance of the tax, the Board could permit him to file his appeal; otherwise he had no recourse. It is to be noted that he could not even petition the Board for leave to file an appeal until after he had paid (approximately) one-half the tax. This requirement *effectively prevented the respondent from obtaining any hearing whatever* as to the validity or amount of its assessments for 1938 and 1939 because it was *wholly unable financially to make the required payments.*

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While this new section *in form* gave a right of appeal, it really imposed an obstacle on the road to the Appellate Tax Board *which had never existed before.* Its only virtue was that the condition imposed was a little less harsh than that which was injected into sections 64 and 65 by the same act. The whole purpose of the new statute was not to confer rights but to take away rights which previously existed. It imposed a drastic limitation on the right of any taxpayer whose land was taxed for more than $1,000 to obtain *any review* of the decision of the Assessors, or *any hearing whatever,* in any case where, as here, the Assessors have seen fit not to make any decision.

There is no way in which the assessing board itself could be compelled to grant a hearing, even if a hearing before the assessors would have been adequate. The statute contains no affirmative requirement that they shall either grant a hearing or make a decision. Mandamus would not have lain to compel the Assessors to grant a hearing,

Eastern Racing Association v. *Revere* 300 Mass. 578 (1938) and even if mandamus would have lain, it would have been futile, and no taxpayer could have hoped by mandamus to compel a hearing by the Assessors within the statutory period of ninety days following their four months period of inaction, during which the time for appeal was running. The express provision in the statute that, if the Assessors *fail* to act on an application within four months from the date it is filed it shall be deemed to be refused, is an express recognition of the fact that the Assessors *are not required to do anything* unless they choose to do so.

In any event in a case like the present, a hearing merely before the Board of Assessors would have been wholly inadequate, for questions of law must be passed on by a *judicial* tribunal,

Ohio Valley Water Company v. *Ben Avon Borough* 253

U.S. 287 (1920) and in any case where, as in this case, the taxpayer claims his *constitutional* rights have been violated, he is entitled to a review of both *law and facts* by some tribunal *other* than the Board which levied the assessment. *Chicago, Burlington & Quincy Railroad* v. *Osborn* 265 U. S. 14 (1924).

The imposition of the requirement of payment of all or half the tax as a condition precedent to an appeal from the Assessors to the Appellate Tax Board is thus in reality the imposition of this requirement of payment as a condition precedent to *any* hearing. The statute which imposed this condition of payment with which Appellant, being without the necessary funds, was unable to comply, barred the Appellant's path at the threshold of the Appellate Tax Board, and *prevented any hearing;* and it is this statute which Appellant contends is repugnant to the Fourteenth Amendment. With this preliminary and necessary knowledge of the Massachusetts law as to abatements, we believe the import of the Appellant's contentions will be clear.

Appellant's Contentions Below and the Rulings Thereon

The Appellant, in paragraph 21 of its amended answer to the petition (R 11), set up that its right to proceed by petition for abatement of its assessments was restricted by said statute St. 1938, c. 478, so that it was obligated as a condition of obtaining any relief from the refusal or failure of the Assessors to grant abatement as regards taxes for 1938 and subsequent years to pay one-half the tax assessed; that it had sought abatement for 1938 and 1939 by appropriate applications filed with the Assessors, but that the Assessors failed to act thereon or to afford any hearing, that the Appellant filed appropriate appeals with the Appellate Tax Board, but *without* payment of tax as required by the statute, because it was wholly unable financially to make such payment, that the Appellate Tax Board dis-

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missed said appeals, solely because of said statute, and Appellant's inabilty to make the required payments, and without hearing on the merits; and that the denial of relief herein would involve a denial of due process and of equal protection within the prohibitions of the Fourteenth Amendment.

The record shows that these applications filed by the Appellant with the Assessors seeking abatement for both 1938 and 1939 and the further efforts of Appellant to appeal to the Appellate Tax Board and there obtain a hearing as to both said years included *each of the three parcels* designated in the petition as Parcels 1, 2 and 3 (Ex. 53-57 inclusive; Ex. 85-88 inclusive).

The statute was the sole ground upon which relief was denied; and the question whether it was repugnant to the Fourteenth Amendment was thus directly in issue.

In paragraph 16 of the Appellant's Requests for Rulings before the Land Court, Appellant asked a ruling in substance that the assessments so made without opportunity for hearing (which was barred by the statute) were invalid and that a decision sustaining the takings based thereon would violate Appellant's rights under the due process and equal protection clauses of the Fourteenth Amendment. (R 49) The trial court refused this ruling. (R 45) It upheld the statute and held that the Appellant's rights under the Fourteenth Amendment had not been violated (R 30); and when the Supreme Judicial Court of Massachusetts affirmed the decision of the Land Court it *necessarily held* that the statute did not violate Appellant's rights under the Fourteenth Amendment. The final decree of the Land Court pursuant to the rescript was accordingly entered on October 23, 1947.

By the decision, order and decree below the assessments for 1938 and 1939 as to Parcels 1, 2 and 3 were held valid,

notwithstanding that the Appellant, pursuing the only remedy open to it under the law of Massachusetts, had been denied a hearing, solely because of the restrictive provisions in the statute, with which it was unable to comply.

This issue is not only substantial but vital because if the statute which prevented Appellant from obtaining a hearing on the validity and amount of its assessments is repugnant to the Fourteenth Amendment, the assessments in question must be void and the takings based thereon of no effect.

It is true, that, as to Parcel 1, notwithstanding the conclusion of the Court that the *assessments* thereon were valid and proper, the City's petition for foreclosure as to that parcel was denied because, as to one of the years in question, 1938, separate assessments had been made on two portions of it, and the Court held that the parcel could not be taken as a whole for nonpayment of the combined tax upon the constituent lots. This was solely a rule of Massachusetts law, and notwithstanding this rule, it is submitted that the validity of the assessments on Parcel 1 is still material in this case, because of the provisions of G. L. (Ter. Ed.) c. 60, s. 37, which reads in material part as follows:

> "If while such lien is in force a tax sale or taking has been made, . . . but the sale or taking is invalid by reason of any error or irregularity in the proceedings *subsequent to the assessment*, the lien and also the lien or liens for any subsequent taxes or charges which have been added to the tax title account under authority of section sixty-one shall continue . . . for ninety days after the sale or taking has been finally adjudged invalid by a court of competent jurisdiction." (Italics ours.)

It cannot be doubted that the City will immediately proceed to make another sale or taking on the assumption that its lien is continued in effect by this statute.

But whether or not the validity of the assessments as to *Parcel 1* is properly in issue on this appeal, the *validity of the similar assessments on Parcels 2 and 3 is clearly in issue;* for as to Parcels 2 and 3 the decree below held both the *assessments* and the *takings* based thereon to be *valid*, and decreed that the Appellant's rights be foreclosed. There was the same *denial of any hearing* as to the 1938 and 1939 taxes on *all three parcels.* All the pertinent facts were precisely the same. This denial of hearing was *for the same reason* in each case, namely, *because of the requirements of the statute.* The validity of the assessments as to Parcels 2 and 3 being directly in issue, the validity of the statute which prevented those hearings is likewise directly in issue.

It is respectfully submitted that the jurisdiction of the Supreme Court of the United States on appeal under Section 237(a) of the Judicial Code is clearly established.

BURTON E. EAMES,
Counsel for Appellant, Marden & Murphy, Inc.

APPENDIX "A"

St. 1938, c. 478

(This statute amended General Laws, Chapter fifty-nine, sections sixty-four and sixty-five, by inserting additional provisions. It also added a new section designated sixty-five B. In the following the *language inserted by this statute in sections sixty-four and sixty-five is italicized.* If we omit the italicized words, we have sections sixty-four and sixty-five substantially as they previously existed.[4]

An Act relative to abatement of certain taxes.

Whereas, The deferred operation of this act would tend to defeat its purpose, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted, etc., as follows:

Section 1. Chapter fifty-nine of the General Laws is hereby amended by striking out section sixty-four, as most recently amended by section six of chapter four hundred of the acts of nineteen hundred and thirty-seven, and inserting in place thereof the following:—*Section 64.* A person aggrieved by the refusal of assessors to abate a tax *on personal property which has been paid, or a tax of not more than one thousand dollars on a parcel of real estate, or a tax of more than one thousand dollars on a parcel of real estate which tax either has been paid or on account of which there has been paid a sum not less than the amount which would be assessable in said year upon a valuation equal to the average of the valuations of said parcel, as reduced by reason of abatements, if any, for the three years next preceding said year,* may, within sixty days after receiving the notice provided in section sixty-three, or within ninety days after the time when the application for abatement is deemed to be refused as hereinafter provided, appeal therefrom by filing a complaint with the clerk of the county com-

[4] The only exceptions were the following:—in line 16 of Section 1 the words "section sixty-three" were substituted for "the preceding section" and in line 8 of Section 2 the words "Appellate Tax Board" were substituted for "Board of Tax Appeals."

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missioners, or of the board authorized to hear and determine such complainants, for the county where the property taxed lies, and if on hearing the board finds that the property has been overrated, *and that the complainant has complied with all applicable provisions of law,* it shall make a reasonable abatement and an order as to costs. Whenever a board of assessors, before which an application in writing for the abatement of a tax is or shall be pending, fails to act upon said application, except with the written consent of the applicant, prior to the expiration of four months from the date of filing of such application it shall then be deemed to be refused *and the assessors shall have no further authority to act thereon; provided, that during the period allowed for the taking of an appeal the assessors may by agreement with the applicant abate the tax in whole or in part in final settlement of said application, and shall also have the authority granted to them by section seven of chapter fifty-eight A to abate, in whole or in part, any tax as to which an appeal has been seasonably taken.* If the list of personal property required to be brought in to the assessors was not brought in within the time specified in the notice required by section twenty-nine, no tax upon personal property shall be abated unless the board appealed to finds good cause for this delay or unless the assessors have so found as provided in section sixty-one, or unless such tax exceeds by fifty per cent the amount which would have been assessed on such estate, if the list had been seasonably brought in, and in such case only the excess over such fifty per cent shall be abated. A tax or assessment upon real estate may be abated although no list of property was brought in within the time specified by the notice required by section twenty-nine; provided, that the application for an abatement of such tax or assessment included a sufficient description of the particular real estate as to which an abatement is requested.

Upon the filing of a complaint under this section the clerk of the county commissioners or of the board authorized to hear and determine the same shall forthwith transmit a certified copy of such complaint to the assessors and the assessors or the city solicitor or town counsel may within thirty days after receipt of said copy give written notice to said

clerk and to the complainant that the town elects to have the same heard and determined by the appellate tax board. Thereupon, the clerk of the county commissioners or of the board authorized to hear and determine such complaints shall forward all papers with respect to such complaint then in the file of the county commissioners or other such board to the clerk of the appellate tax board and proceedings with respect to such complaint shall thenceforth be continued as provided in chapter fifty-eight A. If upon hearing *it appears that the complainant has complied with all applicable provisions of law* and the appellate tax board finds that the complainant is duly entitled to an abatement, it may grant him such reasonable abatement as justice may require, and shall enter an order directing the treasurer of the town to refund said amount, if the tax sought to be abated has been paid, together with all charges and interest at five per cent on the amount of the abatement from the date of the payment of the tax. The board may make such order with respect to the payment of costs as justice may require.

Section 2. Said chapter fifty-nine is hereby further amended by striking out section sixty-five, as most recently amended by section one of chapter one hundred and sixty-seven of the acts of nineteen hundred and thirty-three, and inserting in place thereof the following: *Section 65.* A person aggrieved as aforesaid may, instead of pursuing the remedy provided in section sixty-four; but subject to the same conditions, appeal to the appellate tax board by filing a petition with such board within sixty days after receiving the notice required by section sixty-three, *or within ninety days after the time when the application for abatement is deemed to be refused as provided in section sixty-four.* Such appeal shall be heard and determined by said board in the manner provided by chapter fifty-eight A. The board may enter such order as justice may require in the manner provided in the preceding section with respect to complaints removed from the county commissioners.

Section 3. Said chapter fifty-nine is hereby further amended by inserting after section sixty-five A the following new section: *Section 65B.* A person aggrieved by the

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refusal of assessors to abate a tax of more than one thousand dollars on a parcel of real estate, on account of which tax there has been paid either a sum not less than one half of the amount of such tax or a sum not less than one half of the amount which would be assessable in said year upon a valuation equal to the average of the valuations of said parcel, as reduced by reason of abatement, if any, for the three years next preceding said year, who claims to be unable presently to pay the amount of tax remaining unpaid, may, within sixty days after receipt of the notice provided in section sixty-three, or within ninety days after the time when the application for abatement is deemed to be refused as provided in section sixty-four, petition the appellate tax board for leave to file an appeal therefrom to said board. Such petition shall allege that the petitioner is unable presently to pay such amount of tax, and that, except for failure to comply with the provision of section sixty-four relative to payment of such tax, the petitioner is entitled to an appeal under section sixty-five, and shall be filed with the clerk of the appellate tax board. A notice of the filing of such petition shall be given by said clerk to the appropriate assessors within five days from the date of the filing of such petition, in such form and in such manner as the appellate tax board shall by rule provide, and a hearing, due notice of which shall have been given, shall be had on such petition not later than twenty days from the date of the filing thereof. Such petition shall be heard by a single member of said board. If such member finds the allegations in such petition to be true, he may by order, grant leave to such petitioner to file such appeal, within ten days from the entry of said order, upon such conditions as may be imposed therein, which may require such petitioner to pay, in whole or by installments, the amount of the tax remaining unpaid, as a prerequisite to any hearing on the merits of the appeal filed under said order. If the complainant fails to comply with any of the conditions imposed in said order an appeal filed thereunder may, upon motion, be dismissed by any member of said board. If the complainant complies with the conditions imposed in said order the appeal filed thereunder shall thereafter be heard and determined by said board in the manner provided by chapter

fifty-eight A. The board may enter such order as justice may require in the manner provided in section sixty-four with respect to complaints removed from the county commissioners.

(Section 4 is omitted.)

APPENDIX "B"

City of Lowell, Petitioner,

v.

Marden & Murphy, Inc., Respondent

Lummis, J.:

This is a petition filed in the Land Court on August 21, 1944, to foreclose all rights of redemption in four parcels of land in Lowell which were taken by the petitioner on August 17, 1942, for the nonpayment of taxes for the years 1933 to 1941, both inclusive. G. L. (Ter. Ed.) c. 60, s. 65, as amended by St. 1933, c. 325, s. 12, and by St. 1938, c. 305. Four parcels were taken, as follows: parcel 1, eighty-nine thousand seventy-nine square feet, located northerly of Jackson Street; parcel 2, forty-nine thousand six hundred twenty-nine square feet, located northerly of Jackson Street; parcel 3, nine thousand nine hundred forty-four square feet, located southerly of Jackson Street; and parcel 4, three thousand two hundred fifteen square feet, located southerly of Jackson Street. No two of these four parcels are contiguous to each other. Marden & Murphy, Inc., the owner, and Hamilton Company, a mortgagee, appeared and answered. The Land Court decided in favor of the petitioner as to parcels 2, 3 and 4, and against it as to parcel 1. Both the petitioner and Marden & Murphy, Inc., appealed. Since no other respondent appeared or argued in this court, Marden & Murphy, Inc., will hereinafter be called the respondent.

The first point taken by the respondent is that in the assessment of parcels 1 and 2 the respondent was assessed for water power that it did not own. But the water power

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was not assessed as a separate piece of property. Its value merely enhanced the value of the land, as in other cases in which valuable water power has been considered for purposes of taxation. *Essex Co.* v. *Lawrence*, 214 Mass. 79, 90, 91. *Assessors of Lawrence* v. *Arlington Mills*, 320 Mass. 272, 276. If the inclusion of the value of the water power was wrong, the only remedy of the respondent was by a petition for abatement. *Central National Bank* v. *Lynn*, 259 Mass. 1, 7, *S. C.* 266 Mass. 145. *Codman* v. *Assessors of Westwood*, 309 Mass. 433, 435.

The respondent contends that the tax taking for the taxes of 1938 and 1939 was invalid because the respondent had had no opportunity to obtain a reduction in the valuation. It is not disputed that the tax was greater than the amount for which an abatement might be sought without payment upon the tax, under G. L. (Ter. Ed.) c. 59, ss. 64, 65, as amended. By St. 1938, c. 478, s. 3 (G. L. (Ter. Ed.) c. 59, s. 65B), where a tax on a parcel of real estate exceeds $1,000, a payment, generally of half the tax, must be made as a condition of appeal to the Appellate Tax Board. It is settled that such a payment may constitutionally be made a condition of a hearing upon an application or an appeal for abatement, regardless of the financial condition of the taxpayer. *Old Colony Railroad* v. *Assessors of Boston*, 309 Mass. 439. *Lincoln Hotel Co.* v. *Assessors of Boston*, 317 Mass. 505. We remain satisfied with those decisions, which are decisive as to the present objection raised by the respondent.

The respondent contends that the assessments in question were invalid because the description of the property assessed was inadequate. At most the variances from the correct area were one thousand seven hundred forty-five square feet as to parcel 1, out of an area of eighty-nine thousand seventy-nine square feet; four hundred forty-one square feet as to parcel 3, out of an area of nine thousand nine hundred forty-four square feet; and two hundred eighteen square feet as to parcel 4, out of an area of three thousand two hundred fifteen square feet. The locations of the parcels in the assessment book were sufficient to identify them. In *Roberts* v. *Welsh*, 192 Mass. 278, 280, this

court said that the statutes do not intend that the description in a valuation list "should necessarily be accurate in detail for the purpose of a conveyance. It is enough if it fairly designates, for the information of those interested, the property intended to be taxed." See also *Lenox* v. *Oglesby*, 311 Mass. 269, 274. The judge was right, we think, in finding that the taxpayer knew what property was being assessed, and was not misled. *Franklin* v. *Metcalfe*, 307 Mass. 386, 389, 390. *Boston* v. *Boston Port Development Co.*, 308 Mass. 72, 78.

The respondent raised, but did not argue in this court, the point that the abatement of the taxes for the years 1930, 1931 and 1932 prevented the tax from being lawful. Of course the abatements destroyed any tax lien for the taxes of those years. No later sale or taking for those years was ever made. Nothing in that transaction prevented the taking in question for nonpayment of the taxes of later years. See *Newton* v. *Noone*, 319 Mass. 374.

The land in question was sold by the Collector of taxes to the city of Lowell on March 17, 1937, but on petitions to foreclose the rights of redemption from that tax sale the Land Court, on May 21, 1942, held the tax title conveyed by such sale to be invalid, and the petitions were dismissed. After disclaimers of such tax title, a new taking was made on August 17, 1942. The respondent contends that the assessments of taxes to it for the years 1937 to 1941, inclusive, were void, because such assessments should have been made to the city of Lowell as the holder of the tax titles which were held to be invalid as stated above.

By G. L. (Ter. Ed.) c. 60, s. 78, "Before foreclosure or redemption, taxes on land taken or purchased by a town shall be assessed to the person to whom they would be assessed if the land had not been so taken or purchased." This section was repealed by St. 1936, c. 194. By G. L. (Ter. Ed.) c. 59, s. 11, taxes on real estate were assessable to the person who was either the owner "or in possession thereof," and it was provided that the record owner shall be deemed to be the true owner, "and so shall the person so appearing of record under a tax deed not invalid on its face." The quoted portions of the section were omitted

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when it was revised by St. 1936, c. 92. Accordingly, when the section was again revised by St. 1939, c. 175, real estate was made taxable to the "owner," and the record owner was deemed the true owner. We think that these statutory changes made it impossible after 1936 to tax real estate to a tax title holder. See Nichols, Taxation in Massachusetts (3d ed. 1938) 267, 268. Apparently the right to assess land to a tax title holder was the creature of express statute, and ceased when an express provision permitting such taxation was no longer to be found in the statute. *Burr* v. *Boston*, 208 Mass. 537, 543. We think the judge was right in ruling that the "taxes for the years 1937 to 1941, inclusive, were properly assessed to Marden & Murphy, Inc."

General Laws (Ter. Ed.) c. 60, s. 53, as appearing in St. 1933, c. 164, s. 3 provides that notice of the intention of the collection to take land for nonpayment of taxes shall be posted "in two or more convenient and public places." In the present case one notice was posted on the sign designating the office of the city treasurer and collector in the corridor of the Lowell city hall, and it is not questioned that that was a convenient and public place. The controverted question arises as to the other notice, which was posted in the men's reading room of the Lowell public or city library. It is not contended that that was not a "convenient" place. The respondent contends that as women would not be likely to visit the men's reading room, it was not a "public place." But it does not appear that women were excluded. The term "public" as applied to place, is not an absolute but a relative term, used in contradistinction to the term "private." *Cahoon* v. *Coe*, 57 N. H. 556, 595. *Bowker* v. *Semple*, 51 R. I. 142, 147, 148. Surely the men's reading room could not be called a "private" place. The only purpose of posting is to make it probable that knowledge of the proposed taking will reach the persons interested in the land. We think that the men's reading room was a "public place" within the meaning of the statute, even though it was not as completely public as some other places. The fact that in the collector's affidavit of the posting he stated that one notice was posted in the "reading room" instead of in the "men's reading room,"

is immaterial. Under the statute the fact as to the posting may be proved apart from the affidavit. G. L. (Ter. Ed.) c. 60, s. 57. *Southworth* v. *Edmands*, 152 Mass. 203, 208.

In the Land Court the respondent contended that the takings were invalid because at the time and place of taking the notice was not read and the collector did not state that the land of Marden & Murphy, Inc., was being taken. This point was merely mentioned in the brief of the respondent in this court, but was not argued, and consequently is treated as waived. *Commonwealth* v. *Gale*, 317 Mass. 274, 276.

The respondent contends that the collector of taxes was not lawfully authorized and qualified to make the tax taking in question. General Laws (Ter. Ed.) c. 60, s. 13, as appearing in St. 1941, c. 308, provides that the collector, before the commitment to him of any taxes of any year, shall give a bond or bonds for the faithful performance of his duties "in a form approved by the commissioner" of corporations and taxation, and in such sum "as shall be fixed by the . . . mayor and aldermen," whose powers the city council possess. The bonds given by the collector under that statute for the years 1940, 1941 and 1942 were approved by the commissioner and by the city council. Findings of fact to that effect were made by the judge. Besides, we think that the statute requiring bonds is intended for the protection of the city and is of no concern to the taxpayer. *Boston* v. *Barry*, 315 Mass. 572, 578.

The respondent contends that the taking was invalid as to parcel 1 because two contiguous parcels separately assessed were advertised and taken in one proceeding and as a single parcel. In 1938 a part of parcel 1, containing sixty-nine thousand three hundred thirty-nine square feet, was assessed to the respondent, and the remainder, containing nineteen thousand seven hundred forty square feet, was assessed to Proprietors of Locks and Canals on the Merrimack River, and was reassessed to the respondent on March 31, 1939. In *Marlborough* v. *Poorvu*, 305 Mass. 124, a tract of land which could have been taxed as a unit was in fact assessed in three separate though contiguous parcels. It was held that a tax lien covers only the same unit as

the assessment, and that the whole tract could not be sold as a whole for nonpayment of the combined tax upon the three parcels. See also *Shruhan* v. *Revere*, 298 Mass. 12. The judge was right in ruling the tax taking invalid as to parcel 1, and in dismissing the petition as to that parcel.

But we think that he was right in deciding in favor of the petitioner as to the other parcels. The respondent has presented to us a motion, assented to by the petitioner, to add to the record a transcript of the evidence, on the theory that this proceeding is in equity. See *Lynn Institution for Savings* v. *Taff*, 314 Mass. 380; *Harrington* v. *Anderson*, 316 Mass. 187; *Wareham Savings Bank* v. *Partridge*, 317 Mass. 83, 84. But without the transcript the record before us is sufficient to enable us to decide the case, and the result would not be changed if we were to consider the transcript. Since no useful purpose would be served by adding to the record, we deny the motion *pro forma*, without deciding the question of practice argued.

Decision affirmed.

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Supreme Court of the United States

OCTOBER TERM, 1947

No. 449

MARDEN & MURPHY, INC., *Appellant*

v.

CITY OF LOWELL, *Appellee*

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

This case is pending in this Court on appeal from the decision of the Land Court of Massachusetts as affirmed by the Supreme Judicial Court. The appeal is taken under Section 237(a) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, 43 Stat., 937; 28 U.S.C. Section 344(a) because there is drawn in question in this cause the validity of a statute of the Commonwealth of Massachusetts (St. 1938, c. 478) on the ground of its being repugnant to the Fourteenth Amendment and that the decision is in favor of its validity.

A motion by the Appellee to dismiss or affirm, with the Appellee's Statement Opposing Jurisdiction, were served upon Appellant November 10, 1947.

I.

THE APPEAL IS NOT DIVISIBLE BUT MUST STAND OR FALL AS A WHOLE

In subdivisions I and II of its "Statement Opposing Jurisdiction" Appellee seeks dismissal or affirmance as to Parcel 1 and as to Parcel 4 (R. 337)*, and in subdivision III

* Page references are to the record in this case as docketed on the appeal.

Appellee complains that certain of the Assignments of Error (Numbers 9, 10, 11 and 12) do not attack the statute but are reviewable only by *certiorari*, (R. 338) and that the Assignments of Error just mentioned attack the assessments for all the years from 1933 to 1941, both inclusive, whereas, as Appellee claims, Appellant is not entitled to question them except for 1938 and 1939. (R. 339)

It is conceived that the appeal cannot be allowed in part and disallowed in part; that it is not separable or divisible, and that it must stand or fall as a whole. These contentions of the Appellee are therefore not material on the question of allowance or disallowance of the appeal. They are merely contentions as to what issues will be open on the appeal if the appeal shall stand. The question whether the statute is repugnant to the Fourteenth Amendment is directly raised in Assignments of Error numbers 1, 2, 3 and 8. (R. 293-295)

That some of the Assignments of Error relate to federal questions other than the validity of the statute is wholly unimportant so far as the allowance or disallowance of the appeal is concerned. The cases show that where a substantial federal question is involved, which justifies appeal, and where appeal has been taken, this Court will consider any *other* federal questions raised in the record, which independently considered would support *certiorari* only.

Flourney v. *Wiener* 321 U.S., 253, 263, 754 (1944)

Prudential Insurance Company v. *Cheek* 259 U.S., 530, 547 (1922)

It is the intention of the Appellant to file a petition for *certiorari* in this case, as ancillary to the appeal, and Appellee will then have the right to set forth any objections which it may have to the granting of such petition.

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II.

No Adjudication of Values of Appellant's Properties was Made by the State Court and None could Have been Made as the Issue was Not Open

The Appellee in subdivision III also appears to claim that the Land Court made findings as to the value of Appellant's properties, and therefore as to the propriety of the assessments as to amount. (R. 339-340) This is a clear misapprehension. No evidence of value was introduced at the trial in the Land Court by either side, and that Court made *no findings as to value*. Appellant did introduce evidence to show that, in the values which the Assessors placed upon the property for all the years in the period, they had *included* an item of *twenty cents per square foot* for the *water power* which they *knew the Appellant had sold*. The Land Court's statement that

> "We have here at the most a raising or enhancing of the value of Parcels 1 and 2 by twenty cents a square foot." (Dec. R. 26)

which is referred to by the Appellee (R. 339), immediately followed a discussion of the Massachusetts rule that water power is not taxed independently but merely as an "enhancement" of the value of the land to which it is applied, and his further statement that there was no separate or independent assessment of water power but that the land and water power together were given a single valuation. (Dec. R. 24-26). What the Court obviously meant was that the addition of twenty cents per square foot which the Assessors had made for water power was only an *over valuation* of the land, for which Appellant "might have sought abatement in each of the years," (R. 26) and that such abatement proceedings were his only remedy. This is the same ruling which we find in the opinion of the Supreme Judicial Court. (R. 315-316)

Furthermore, the issue as to the *amount* of the assessment was not open; for under Massachusetts law a person

assessed cannot question the *amount* of the tax in a proceeding involving the validity of the tax sale or taking.

Garden Cemetery Corporation v. *Baker* 218 Mass. 339

Nichols on Taxation in Massachusetts (3rd. Ed.) p. 387, 395

It still remains true, as the Supreme Judicial Court stated in this very case, that abatement proceedings are the exclusive remedy for the taxpayer who questions the *amount* of his assessment. (R. 316)

But this is very far from saying that the taxpayer, in a proceeding to foreclose his rights under a tax sale or taking, cannot set up that the assessments upon which the tax was based were *wholly invalid.*

If it should first be held that the statute complained of (St. 1938, c. 478) is constitutional and that the Appellant was properly denied any hearing as to its validity or amount; and if it should then be ruled that the Appellant cannot question the validity of the assessment in this proceeding, the violation of constitutional right, the denial of due process of law and the denial of the equal protection of the laws would then be *complete;* as it would appear that *no* remedy is available either to question the wrongful assessment in the first instance or to defend against the seizing of the taxpayer's property in satisfaction of the tax based on such assessment.

III.

Appellant's Jurisdictional Statement Sufficiently Showed That This Case is Within the Jurisdictional Provisions Relied on

Appellee in subdivision IV of its Statement objects that Appellant's Jurisdictional Statement fails to show that the case is within the jurisdictional provisions relied on—specifically that it does not show that the 1938 and 1939 taxes here involved were more than $1,000. "on any parcel of real

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estate." (R. 342) Rule 12, paragraph 1 of the Rules of this Court requires that the jurisdictional statement "shall show that the nature of the case and of the rulings of the Court was such as to bring the case within the jurisdictional provisions relied on." Although the specific statement to that effect appears to have been omitted, we submit the Jurisdictional Statement does clearly and amply "show" that the tax on each of the Parcels 1, 2 and 3 for each of the years, was in fact more than $1,000. The opinion of the Supreme Judicial Court of Massachusetts which was annexed to the jurisdictional statement states clearly that *"it is not disputed that the tax was greater than the amount for which an abatement might be sought without payment upon the tax."* (R. 316) Although in the quoted statement the Court apparently had in mind particularly Parcels 1 and 2, it was true in fact as to each of the three parcels for both 1938 and 1939. This has never been questioned. Indeed the only reason why either the Land Court or the Supreme Judicial Court was dealing with the constitutional question at all was because the taxes on one or more of the parcels did exceed $1,000.; otherwise the question would never have arisen.

IV.

The Only Opinion Required by Rule 12, Paragraph 1 was Appended to the Jurisdictional Statement

In subdivision V of its Statement Opposing Jurisdiction the Appellee objects that, while the Appellant *did* append to its Statement on Jurisdiction a copy of the opinion of the Supreme Judicial Court in this case, it did not also append copies of the opinions in two earlier cases *cited* by the Court, namely,

Old Colony Railroad Company v. *Assessors of Boston*, 309 Mass., 439 (1941)

Lincoln Hotel Co. v. *Assessors of Boston*, 317 Mass., 505 (1945)

and further that it did not append a copy of the decision of the *Land Court* in this case. (R. 342-344)

The Appellant respectfully submits that the opinion attached to its Statement on Jurisdiction was the only one required under the rule. The two cases cited in that opinion were clearly not "earlier opinions in the same case or opinions in companion cases." The opinion in the *Old Colony Railroad Company* case was long, and the Appellant in its Statement gave precise references to the pages in each of the cited cases where the question of the validity of the statute was passed on. (R. 302)

Appellant understands that the rule in question is not intended to include decisions or memoranda by the trial court, where the case has been appealed and the entire matter passed upon by the State Court of last resort. The decision of the Supreme Judicial Court is the authoritative decision in Massachusetts. The decision of the Land Court was long and dealt with much that was wholly immaterial to the issues before this Court. It is readily available, if desired, as it is set out in full in the record. (R. 13-45)

Appellee quotes from the decision of the Land Court to the effect that Appellant did not argue the constitutionality of the statute before that Court, stating that it had been passed on by the Supreme Judicial Court in two cases. Under these circumstances it would have been futile for the Appellant to argue the constitutionality of the statute before the Land Court. The quoted portion, however, makes it clear that the Appellant "earnestly contended" that the statute "violates the due process and equal protection provisions of the Fourteenth Amendment to the Constitution"; and it is obvious from the record that the question whether the statute was repugnant to the Fourteenth Amendment was thoroughly argued before the Supreme Judicial Court. (Statement on Jurisdiction R. 301-302; 308-310; Opinion (R. 316)

V.

Appellant's Jurisdictional Statement Clearly Shows that the Appellant is One of the Class Affected by the Statute

Appellee notes in subdivision V (R. 343-344) the statement in the decision of the Land Court *first*, that the question whether Marden & Murphy, Inc. was unable to comply with the provisions of the statute as to payment was immaterial and *second*, that

> "If it should be material, however, it cannot be found as a fact on all the evidence that Marden & Murphy, Inc. was unable to comply with the provisions of said statute as to payment."

and in subdivision VI (R. 344-345) Appellee objects that, *because* of the failure of the Land Court to find that Appellant was financially unable to pay the tax, Appellant is not shown to be one of the class affected by the statute.

If the question of the financial inability of this particular taxpayer is material to its right to question the validity of this statute, Appellant will respectfully ask this Court to review that finding on the ground that there is *no evidence* to support it. This we understand is permissible under the decisions.

> *Hooven & Allison Company* v. *Evatt* 324 U.S., 652, 659 (1945)
>
> *United States* v. *Pink* 315 U.S., 203, 238 (1942)
>
> *Fiske* v. *Kansas* 274 U.S., 380, 385-386 (1927)
>
> *Creswill* v. *Grand Lodge* 225 U.S., 246, 261 (1912)

The Land Court's conclusion was a mere inference from the balance sheets of Appellant during the periods when the payments of tax must be made, if at all, in order to permit the filing of an appeal, that is, during the time permitted for such appeal. The evidence was overwhelming and uncontradicted as to Appellant's lack of money and inability to obtain it.

The present, however, is not the appropriate place or time to discuss this question of fact.

But wholly apart from the financial condition of this Appellant, we submit that Appellant is within the class which is injured because its tax on each of the Parcels 1, 2, and 3, *as assessed*, was more than $1,000. in each of the two years, and it is, therefore, within the requirement of *payment*. Without doubt, in a large public, there must be a substantial number of persons who own land assessed for more than $1,000. but who are without the necessary wherewithal to pay. The statute makes no provision for one in that situation. It states no exceptions. Nor is there any room in the statute for an *interpretation* which would permit the taxpayer who is impecunious to obtain a hearing. Whether he has the money or not, he must pay or he cannot appeal and we respectfully submit that if the denial of a hearing to such taxpayer results in depriving him of his constitutional rights, then the statute must fall.

In *United States* v. *Ju Toy* 198 U.S., 253 (1905), the Court said; per Holmes, J. at pages 262-263,

> "The relevant portion (of the statute) being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces, or altogether void. An exemption of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again. *United States* v. *Reese*, 92 U.S. 214, 221; *Trade-Mark Cases* 100 U.S., 82, 98, 99; *Allen* v. *Louisiana*, 103 U.S., 80, 84; *United States* v. *Harris*, 106 U.S., 629, 641, 642; *Virginia Coupon Cases*, 114 U.S., 269, 305; *Baldwin* v. *Franks*, 120 U.S., 678, 685-689; *Smiley* v. *Kansas*, 196 U.S., 447, 455."

The exemption of the taxpayer who is financially embarrassed cannot be read into the statute "merely for the purpose of saving what remains", and the statute must fall as a whole.

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VI.

The Statutory Provisions as to a Hearing Before the Board of Assessors are Wholly Insufficient

The next objection of the Appellee (subdivision VII; R. 345-347) relates to a matter which we had supposed was long since settled. He argues that Appellant had the right to a hearing before the Assessors of Lowell, and that this was enough. A hearing before the Assessors might be sufficient on questions of *fact*, if it could have been had, but not as to questions of *law* or *constitutional right*.

> *Ohio Valley Water Company* v. *Ben Avon Borough* 253 U.S. 287 (1920)
>
> *Wadley Southern Railway* v. *Georgia* 235 U.S., 651 (1915)
>
> *Chicago, Burlington & Quincy Railroad* v. *Osborn* 265 U.S., 14 (1924)
>
> *Baltimore & Ohio R. Co.* v. *United States* 298 U.S., 349, 368-369 (1936)

Moreover, it appears beyond question that no hearing was afforded the Appellant even before the Assessors. This is a clear inference from the fact that the Assessors took no action on the applications for either year and sent no notice of any kind to the Appellant regarding them. (Dec. R. 27-28) It also appears affirmatively in the evidence. (Evid. R. 209, 222, 260-261)

Nor was there any way of compelling a hearing before the Assessors. The statute gave them four months in which to act and provided that, at the expiration of that time, the applications should be deemed to be refused, and the time for appeal should begin to run, and that the Assessors should then have no further authority to act on the petition except that during the period allowed for appeal they might make a final settlement by agreement with the applicant. (St. 1938, c. 478, s. 1) The statute contains no affirmative requirement that they shall either grant a hearing or make a decision, and

it appears to be settled that the taxpayer could *not* have sustained mandamus against them.

Eastern Racing Association v. *Revere* 300 Mass., 578

That case dealt with the statutes as they existed in 1937 and held that a taxpayer who had not appealed to the Appellate Tax Board could not compel the Assessors to act on his application. The statutes at that time did not deprive the Assessors of the power to act after the four months period had expired, and the right to compel the Assessors to act, therefore, if it existed, would not have been lost. That case is therefore a definite authority to the effect that mandamus would not have lain.

VII.

The Federal Question Here Involved Is Very Substantial

Finally the Appellee suggests in subdivision VIII (R. 348) that the federal question involved in this appeal is not substantial. That question is whether a statute of Massachusetts is repugnant to the Fourteenth Amendment, which provides affirmatively that before the taxpayer can appeal from the refusal or failure of the Assessors to grant abatement, or in other words before he can obtain an adequate hearing, he must pay the entire tax, as assessed, or must pay one-half the tax and satisfy the Appellate Tax Board that he is unable presently to pay the balance. As to the cases which he cites and discusses under this objection, we submit that none of them is in point; and that the extracts which he quotes from the opinions cannot be properly understood unless one has in mind the context and the facts to which they refer. We will discuss them briefly.

In *Tennessee* v. *Sneed* 96 U.S., 69 (1877) the plaintiff sought a writ of *mandamus* to compel the Collector to receive

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in payment of tax certain bills of the Bank of Tennessee which the plaintiff brought into Court. The defense set up that a state statute forbade suit against the state or its officers and that the receipt of the bills in question in payment of tax was prohibited by the new State Constitution of 1865, and by a statute passed in 1873. The charter of the Bank of Tennessee (1838) had provided that such bills should be receivable for taxes. After referring to the claim of the plaintiff that the Acts of 1873 were laws impairing the obligation of the contract in the Bank charter, the Court said (Hunt, J. p. 73)

> "This is the only point in the case involving a question of federal jurisprudence and the only one that it is necessary for us to consider."

In *Phillips* v. *Commissioner* 283 U.S., 589 (1931) the rule laid down by the Court was that

> "Where only property rights are involved mere *postponement* of the judicial inquiry is not a denial of due process *if the opportunity given for ultimate judicial determination of the liability is adequate.*" (Italics ours) (pp. 596-597)

Neither payment nor the giving of security was a condition precedent to obtaining a judicial review.

The case of *Nickey* v. *Mississippi* 292 U.S., 393 (1934) has no application to the present case. There the appellants who were non-residents had been assessed on tracts of land in Mississippi. They failed to pay on one tract only, and the state brought suit, attaching other lands on which the tax had been paid. The appellants secured the release of the attachments by giving bond. In that case it was held by this Court that as the State Court had ruled the appellants (defendants below) could assail the correctness and legal sufficiency of the assessments as matters of defense in the suit, and as the defendants had appeared and had full opportunity to be heard before the decree became final, there

was no denial of due process; also that the State could collect the tax on one parcel out of other parcels owned by the same person, even though non-residents. This appellant can have no criticism of that decision on either point, but the case is not relevant here. The giving of the bond to release the attachment was apparently wholly voluntary.

In *McMillen* v. *Anderson* 95 U.S., 37 (1877) it is particularly necessary to have the facts of the case in order to understand the portions the Appellee has quoted. In that case the plaintiff sought an injunction against the sale of its property which had been seized by the Collector for taxes. The Court granted the injunction upon the plaintiff's giving bond and security. It appeared that the plaintiff was liable for the tax. The question was as to the validity of the statute under which the Collector acted. The Court merely held that the statute authorizing seizure was a proper means of enforcing payment and that the Collector could act under it. The fact that the Court required the giving of security as a condition of issuing an injunction against the Collector could not reasonably be objected to. It was perfectly sound to permit the Collector to exercise his summary authority to collect since the statute under which he acted was valid.

These cases we submit are not even relevant here.

In the Appellee's Statement Opposing Jurisdiction he appears to represent the Appellant as contending that the taxpayer "has a constitutional right to withhold payment of a tax until it has been finally adjudicated." (R. 351) This Appellant makes no such contention, and it never has.

We do not argue, and never have, that the processes of collecting the tax should be suspended pending such determination. Rights and remedies available to the Collector of Taxes are various. He may sell or he may seize or "take" the land, as he has done in this case; or he may sue and attach the taxpayer's property. All the summary remedies remain, and should remain, in full force and effect. We argue only *that the requirement of payment of the tax as a condition of obtaining a proper hearing is fundamentally unfair and unjust, and that it violates the Fourteenth Amendment.*

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A number of the cases cited by the Appellee state clearly the rule for which we here contend, namely, that the taxpayer must have *the right to be heard before the tax is finally established against him.* This Appellant through no fault of its own but only because of lack of funds has been afforded no hearing before any tribunal or body, administrative or judicial, either before or after assessment.

The question whether a statute which affirmatively imposes such a condition upon the right to a hearing is repugnant to the Fourteenth Amendment of the Constitution of the United States has never been decided by this Court so far as we have been able to ascertain. Certainly that question is not disposed of in the negative by any authorities cited by the Appellee. The decisions of this Court for the past sixty years all emphasize without qualification the right of the taxpayer to a hearing. The effects of this statute which bars such a hearing to him who cannot pay may be far-reaching, and we respectfully submit that its validity is a substantial question deserving of consideration by this Court.

VIII.

CONCLUSION

In conclusion this Appellant states its intention to file a petition for *certiorari* in this case, as ancillary to the appeal, and respectfully asks the Court to consider such petition for *certiorari* and the brief which will be filed in support thereof, in connection with the subject matter of this brief; and further respectfully asks that Appellee's motion to dismiss or affirm be denied.

Respectfully submitted,

BURTON E. EAMES,
Attorney for Appellant.

November 26, 1947

FILE COPY

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Supreme Court of the United States

OCTOBER TERM 1947

No. 449

MARDEN & MURPHY, INC., *Petitioner*

v.

CITY OF LOWELL

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF PETITION

BURTON E. EAMES,
Attorney for Appellant.

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Supreme Court of the United States

OCTOBER TERM 1947

No. 449

MARDEN & MURPHY, INC., *Petitioner*

v.

CITY OF LOWELL

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:—

Your Petitioner, Marden & Murphy, Inc. respectfully shows to this Honorable Court as follows:

I.

STATEMENT OF FACTS

Proceedings below

This is a proceeding begun in the Land Court of Massachusetts on August 21, 1944 by the City of Lowell seeking to foreclose liens claimed by it under four tax takings, made by the Collector of Taxes of said City of Lowell August 17, 1942, purporting to take the lands of the petitioner therein described for non-payment of taxes assessed to petitioner for the years 1933 to 1941 inclusive. (R. 13)

The case was tried in said Land Court in November, 1945 and was decided by said Land Court on March 29, 1946. The assessments were held valid as to all four parcels involved. (Dec. R. 44) Foreclosure was denied as to Parcel 1 because the "taking" was held invalid solely under a rule

of Massachusetts law, but foreclosure was granted as to Parcels 2, 3 and 4. Both parties appealed to the Supreme Judicial Court of Massachusetts, which affirmed the decision of the Land Court by rescript handed down September 11, 1947 and transmitted to said Land Court on the same day. (R. 279-281)

As the case involved the validity of a statute of Massachusetts (St. 1938, c. 478) on the ground of its being repugnant to the Fourteenth Amendment, and the decision was in favor of its validity, your petitioner has taken an appeal to this Court which is docketed as number 449, October Term 1947. This petition for writ of certiorari is ancillary to said appeal.

Intentional and persistent Assessment for Water Power which Assessors knew Petitioner did not own

The four parcels involved are designated in the foreclosure petition as Parcels 1, 2, 3 and 4 (R. 1-3), and on the plan introduced as Ex. 10 (R. 57) it appears that Parcels 1 and 2 are situated northerly of Jackson Street and Parcels 3 and 4 southerly thereof. For convenience in identifying them we note that they are respectively designated on said plan as follows:

Parcel 1 as "Marden & Murphy, Inc., Mill No. 7 and Mill No. 7 Extension, 87,334 sq. ft."

Parcel 2 as "Marden & Murphy, Inc. 45,918 sq. ft."

Parcel 3 as "Marden & Murphy, Inc. 9,503 sq. ft." and

Parcel 4 as "Marden & Murphy, Inc. 2,997 sq. ft."

All these parcels, together with others later sold, were acquired by your petitioner in 1927 from the Receivers of Hamilton Manufacturing Company, together with a valuable water power designated in the deed as 16 mill powers "of the description, power and extent described in" an

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indenture between the Proprietors of the Locks and Canals on Merrimack River and said Hamilton Manufacturing Company dated December 1, 1853 and subject to all the provisions of said indenture and of an agreement dated August 1, 1848 between the Proprietors and the various manufacturing companies. (Dec. R. 13, 22; Ex. 12, R. 61; Ex. 16, R. 65; Ex. 15, R. 64) A "mill power" was defined in the indenture in terms of cubic feet of water per second at a stated head. (Ex. 16 Art. I, at p. 4)

For a clear understanding of this matter we should describe briefly the nature of this water power right.

All the water power available from the Merrimack River at Lowell was primarily owned by the Proprietors of the Locks and Canals on Merrimack River, a separate corporation dating back as far as 1792. The Proprietors owned and were obligated to maintain the dam across the river and the canal system, including the Hamilton (upper) Canal and the Pawtucket (lower) Canal, between which petitioner's properties, Parcels 1 and 2, are situated. Owning the land along the canals, they conveyed various mill sites and parceled out the water powers to manufacturing companies under deeds and leases, sometimes referred to as "indentures." (Dec. R. 22) These were uniform except as to the numbers of mill powers granted and the designation of the falls, as there were three levels in the canal system. (Evid. R. 82-83) The indenture from the Proprietors to Hamilton Manufacturing Company, dated December 1, 1853, and covering the sixteen mill powers, which came to petitioner from the Receivers as above, is found in Ex. 16, R. 65.

Petitioner's properties are *not contiguous to the river*, and it had no water power by virtue of riparian ownership or by virtue of ownership of *any* land. *Its only right to water power was under the indenture,* (Evid. R. 78-83; 90) and was contingent upon paying the annual rental ($300. per mill power), avoiding excessive use or waste and otherwise living up to its obligations as lessee. (Ex. 16, R. 65)

The picture thus presented is closely analogous to that which was before the Supreme Judicial Court of Massachusetts in *Crocker-McElwain Company* v. *Assessors of Holyoke*, 296 Mass. 338, which dealt with the Holyoke Water Power Company and the canals and water power maintained by that Company. Here, as in that case, the water power company maintains a dam across the river with "a system of canals running through the city in three levels." The mills or lessees take water from one canal, pass it through flumes or penstocks to their water wheels where the power is generated and thence through raceways or wasteways to another canal below. The leases convey stated numbers of mill powers which are defined in terms of cubic feet of water per second at a stated head. In both cases water power which was appurtenant originally to the land at either end of the dam has been appropriated by the water power company and distributed among various mills by *contract*.

The agreement of August 1, 1848 (Ex. 15; R. 64) to which the conveyance of the water powers was subject (supra p. 3), sometimes called the "Arbitration Agreement", was primarily for arbitration of disputes which might arise, but in paragraph XII it expressly contemplated that any of the lessees of water power might transfer their rights, provided the purchaser should enter into a direct agreement with the Proprietors assuming and adhering to the Arbitration Agreement.* When the petitioner acquired these mill powers from the receivers, it entered into the required agreement with the Proprietors, not only adhering to the Arbitration Agreement but also agreeing to perform all the lessee obligations under the lease. (Ex. 23; R. 68)

By deed March 27, 1933, recorded the next day, the petitioner conveyed all this water power to Hamilton Company, a separate corporation from Hamilton Manufactur-

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*The lease itself ran to the lessee and its "successors and assigns". (Ex. 16, Art. VIII, at p. 11)

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ing Company, "and thereafter owned no water power". (Dec. R. 13, 25; Evid. R. 90-91)

This deed conveyed with the water powers a large tract of land comprising substantially the whole of the original mill yard together with the old and new wheel houses; and all water wheels, generators, appurtenant equipment, etc. "situated on the premises hereby conveyed". (Ex. 26; R. 70; Plan Ex. 11; R. 71)

One water wheel was in fact situated in the basement of the building on Parcel 1, and by inadvertance was not mentioned. In order that there should be no question but that all the machinery and equipment had been conveyed, petitioner by deed dated February 8, 1937 and recorded the following day, conveyed this wheel and all turbines, generators, apparatus, and appurtenant equipment with the right to use, maintain, operate, etc. (Ex. 28; R. 74-75)

As required by the Agreement of 1848, Hamilton Company upon acquiring the water powers from the petitioner immediately entered into the necessary agreement with the Proprietors on March 28, 1933. (Ex. 27; R. 74)

Before the conveyance of March 27, 1933 to Hamilton Company, petitioner had conveyed to another corporation, Courier-Citizen Company, certain real estate lying between its water power plant and the Hamilton (or upper) Canal, but had excepted and reserved in and by said deed, full ownership of the penstocks and waterways leading from the Hamilton Canal, through the property conveyed, to petitioner's wheels and all rights and easements necessary to its ownership and use of the water powers, (Ex. 24; R. 68); and by the deed to Hamilton Company on March 27, 1933, all such ownership and rights thus excepted and reserved were passed on to Hamilton Company (Ex. 26; R. 70) together with full rights and easements for raceways or wasteways from the wheels thus conveyed to Hamilton Company, through petitioner's remaining property, to the Pawtucket (or lower) Canal.

An examination of the various deeds and conveyances with the accompanying plans, all which are in the record, will show therefore that at all times after March 27, 1933 (as to the wheel in Parcel 1 from February 8, 1937) Hamilton Company owned the entire water power plant and owned and had the right to use and maintain the penstocks bringing the water from the Hamilton Canal to its wheels; and had perpetual easements through the remaining property of the petitioner for its raceways or wasteways leading from its wheels to the Pawtucket (or lower) Canal.

Deed from petitioner to Courier-Citizen Company with exceptions and reservations of the rights (Ex. 24; R. 68)

Plan dated February and March 1927 (Ex. 25; R. 69)

Deed from petitioner to Hamilton Company March 27, 1933 (Ex. 26; R. 70) recorded the following day.

Plan of portion of Hamilton Yard of Marden & Murphy, Inc. February 14, 1933 (Ex. 11; R. 58, 71)

Deed to Hamilton Company February 8, 1937 (Ex. 28; R. 75)

See also General Plan (Ex. 10; R. 57)

The Board of Assessors of the City of Lowell knew of this conveyance (Dec. R. 24) and in 1933 and various subsequent years were repeatedly advised of this transfer of ownership both by petitioner and by Hamilton Company, by the tax returns of both companies. (Dec. R. 23-25)

Notwithstanding this definite knowledge, however, the Assessors persisted in assessing petitioner in each year from 1933 to 1941 inclusive a definite amount—twenty cents per square foot—on both Parcels 1 and 2 for this water power which they *knew* petitioner *did not own*. The amount of this overassessment in each year was $17,815.80 (89079 sq. ft. x 20 cts) on Parcel 1 and $9,925.80 (49629 sq. ft. x 20 cts) on Parcel 2.* Prior to the conveyance of the water power by petitioner, they had valued the entire area north

*The numbers of square feet assessed appear in the Land Court decision at R. pp. 17-19.

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of Jackson Street (including Parcels 1 and 2) by adding to the land value alone twenty cents a square foot for water power; and they had included water power as appurtenant to the whole area. They continued this method of assessing both Parcels 1 and 2 *after* the conveyance *as before*; and this persisted in all the years down through 1941. (Dec. R. 24; Evid. R. 107, 111-112, 116-119) The conveyance of the water power did not cause them to change their valuation of either Parcel 1 or 2. (Dec. R. 24; Evid. R. 106) In the assessment record for Parcel 1 in each year they expressly stated that water power was included (Dec. R. 17-19), and although not so stated in the assessment record, it appears clearly that water power was included in fact as to Parcel 2 (Dec. R. 24, 26; Evid. R. 106, 107-108; 111-112; 116-117; 119; 136-137). It is apparent that the Supreme Judicial Court of Massachusetts did not question this. (Opinion R. 282)

We submit it is an inescapable presumption that taxpayers generally were and are assessed *only* for property *owned* by them, respectively, and that your petitioner was a shining exception. Can there then be any question but that this treatment of petitioner was not only arbitrary but also harshly discriminatory?

Petitioner made all possible Efforts to Obtain Abatement of Illegal or Excessive Assessments for 1938 and 1939 but was wholly unable to obtain any hearing

As to the taxes for 1933, 1934 and 1935 petitioner did not attempt to appeal to the Appellate Tax Board. (Dec. R. 27)

As to taxes for 1936 and 1937 the petitioner did appeal, and the following reductions in assessed value were made by the Appellate Tax Board. (Dec. R. 26; Ex. 97, R. 249):

Parcel 1	reduced	from	$266,800.	to	$186,000.
Parcel 2	"	"	37,200.	"	15,000.
Parcel 3	"	"	22,300.	"	14,000.
Parcel 4	"	"	4,800.	"	3,000.
	Totals		$331,100.		$218,000.

In 1938 the statute objected to was passed by the Massachusetts Legislature (St. 1938, c. 478),* which became effective July 1, 1938, and therefore applied to any appeals for 1938 and subsequent years.

There were before this statute two roads by way of appeal from the refusal or failure of the Assessors to grant abatement. The aggrieved taxpayer could appeal to the County Commissioners (G.L. (Ter. Ed.) c. 59, s. 64 as amended by St. 1937, c. 400, s. 6) or he could appeal to the Appellate Tax Board (Section 65 of said chapter as amended by St. 1933, c. 167, s. 1). Both these roads were open without condition or qualification. The appeal in either case must be taken within *sixty days* after notice from the Assessors of their decision; but, if they failed to act on the taxpayer's application within four months from the date it was filed, it was deemed to be refused and the appeal in either case must then be filed within *ninety days* thereafter. (St. 1938, c. 478, s. 1)

This new statute inserted into those sections, as they previously existed, the requirement that, *before* appealing either to the County Commissioners or to the Appellate Tax Board, if the tax on a parcel exceeded $1,000., he must pay the *full amount* of the tax as assessed or approximately that amount under an alternative provision, (St. 1938, c. 478, s. 1, 2), but it also inserted a new section designated Sec. 65B, which provided in substance that appeal could be taken to the Appellate Tax Board, where the tax on the parcel assessed exceeded $1,000., if the taxpayer had paid *one-half* the amount required to be paid under the new sections 64 and 65 just discussed, *and* could satisfy said Board that he was unable to pay the balance.

The tax for each of the two years in question was more than $1,000. on each of the three parcels. (R. 27-29) The opinion of the Supreme Judicial Court states that there was no dispute but that these taxes were "greater than the

*This statute is set out in full as an appendix to the brief on this petition (infra p. 40)

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amount for which an abatement might be sought without payment upon the tax". (R. 283) The amounts of the taxes for 1939 upon all three parcels also appear in Ex. 54-56 (R. 127) and 86-88 (R. 212). Each was more than $1,000. The same was true as to 1938 taxes. (Evid. R. 188; 190-191; 214-215)

It is this statute, injected into the statutory provisions governing petitions for abatement, which under the established rule in Massachusetts are the taxpayer's *sole remedy* to obtain reduction of illegal or excessive assessments,* which barred petitioner from any hearing as to the validity or amount of its taxes for 1938 and 1939. This statute was upheld by the Land Court (Dec. R. 30) and by the Supreme Judicial Court (Opinion R. 283) as *not* repugnant to the Fourteenth Amendment, and it is this ruling which is the basis of the appeal in this case.

The Land Court found that petitioner seasonably applied to the Assessors for abatements for both years (Dec. R. 27; Ex. 53, 54-57; R. 126-127) that the Assessors did not act on the applications for either year but allowed the four months to run so that under the provisions of G. L. (Ter. Ed.) c. 59, s. 64, as amended, the applications were deemed to be refused, and the time for appeal began to run; and that they sent no notice to the petitioner as to either year. (R. 27-28)

It is a clear inference from the failure of the Assessors to act on the applications filed with them and their failure to send any notice to the petitioner regarding these applications for either year that petitioner was given *no opportunity for hearing before the Assessors.* It also appeared affirmatively, however, in the evidence. (Evid. R. 209, 222, 260-261), and the failure of the Assessors to act on the applications is recited in the petitions by which the petitioner

*That the statutory petition for abatement is the taxpayer's sole remedy is discussed in the petitioner's (appellant's) statement as to jurisdiction on the appeal in this case. (R. 303-304) It is also expressly stated in the opinion of the Supreme Judicial Court of Massachusetts. (R. 282-283)

attempted to appeal to the Appellate Tax Board. (Ex. 85-88; Evid. R. 209, 212).

Nor was there any way of compelling a hearing before the Assessors, even if such hearing would have been adequate. The statute gave the Assessors four months in which to act and provided that, at the expiration of that time, the application shall be deemed to be refused, and the time for appeal should begin to run. (St. 1938, c. 478, s. 1) Although the Massachusetts Court has stated that these provisions were not intended to relieve Assessors from the duty of hearing or deciding applications for abatement, but rather to provide adequate remedy if they did fail to perform that duty within a fixed time,

> *Eastern Racing Association* v. *Revere*, 300 Mass. 578, 581-582 (1938)

yet the statute contains no affirmative requirement that they shall either grant a hearing or make a decision. They are given four months within which they may act or refuse to act, and after that time has expired (unless an appeal is taken) they have no further authority to abate except that during the time *allowed* for appeal they may abate in final settlement by agreement with the taxpayer. (St. 1938, c. 478, s. 1; infra p. 40) The *Eastern Racing Association* case, just cited, dealt with the statutes as they existed in 1937 and held that a taxpayer who had not appealed to the Appellate Tax Board could not compel the Assessors to act on his application. The statutes at that time did not deprive the Assessors of the power to act after the time for appeal had expired* and the right to compel the Assessors to act, therefore, if it existed, would not have been lost. That case is therefore a definite authority to the effect that mandamus would not lie.

The Land Court also found that petitioner seasonably undertook to appeal to the Appellate Tax Board for both

*The provision depriving them of this power was first inserted by said St. 1938, c. 478, s. 1 (infra p. 40)

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years (Dec. R. 27-28); that as to 1938 the Board refused to accept the appeal on the ground that no part of the tax had been paid (Dec. R. 28; Ex. 85; Evid. R. 209-210); that as to 1939 the appeals were accepted by the Board but were later dismissed for lack of jurisdiction. (Dec. R. 29; Ex. 86-88; Evid. R. 212). The certified record, as appearing in these exhibits, shows that the motion to dismiss was grounded on the fact that the tax in each case was more than $1,000. and that no part of the tax had been paid.

The reason for petitioner's failure to make the required payments was its absolute inability to do so. The Land Court first ruled that the question of financial inability was immaterial (Dec. R. 29) but then proceeded to state that, if material, he could not find it as a fact (Dec. R. 30), basing this conclusion *solely* on an examination of statements of petitioner's financial condition which had been introduced in evidence. (Dec. R. 30) Since petitions to foreclose are equitable in their nature and since questions of constitutional right are involved, your petitioner, being permitted to refer to the evidence, *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 659 (1945), *Creswill* v. *Grand Lodge*, 225 U. S. 246, 261 (1912) will contend, if the question of financial ability is material, that there was no basis for this conclusion by the Land Court but that the evidence was overwhelming to the contrary. This petition, however, is obviously not the proper place for such argument.

We have seen that the Courts of Massachusetts have sustained the assessments, notwithstanding that the Assessors intentionally and persistently included in their assessments in each year from 1933 to 1941, as to Parcels 1 and 2, a definite computed amount for water power which they *knew* petitioner did not own, a procedure which it is inconceivable that they could have followed with other taxpayers; that the Massachusetts courts have held that the statute, which barred petitioner from obtaining any hearing as to 1938 and 1939 taxes on Parcels 1, 2 or 3 is *not* repugnant to

the Fourteenth Amendment; and have held the assessments on said Parcels 1, 2 and 3 valid and enforceable notwithstanding that petitioner was afforded no opportunity for any hearing at any time before any tribunal or body, administrative or judicial, as to the validity or amount of those assessments.

We have seen that petitioner did not appeal to the Appellate Tax Board as to taxes for 1933, 1934 or 1935. We have also seen that the Appellate Tax Board gave substantial abatements for 1936 and 1937. (supra p. 7) It also appears that, for 1940 and 1941 taxes, petitioner was able to make the payments required by the statute and that the taxes for those years were settled by agreement while the appeals were pending. (Dec. R. 26; Evid. R. 249; 257-258)

It is fair to assume, therefore, that, at least as to 1936, 1937, 1940 and 1941, petitioner is not entitled to further relief. (Cf. Dec. R. 26) Petitioner's contentions and arguments will, therefore, be directed primarily to the 1938 and 1939 taxes on Parcels 1, 2 and 3, but petitioner will further wish to attack as wholly improper and unlawful the continued practice of the Assessors, in each year during the whole period, 1933 to 1941, of adding to or including in their assessments of Parcels 1 and 2 the value of the water power which they knew petitioner did not own; and to submit that this continuity is further cogent evidence that the assessments as to said parcels, for 1938 and 1939, were arbitrary, deliberate and persistent and were clearly discriminatory; and that said assessments were therefore in violation of the petitioner's rights under the due process and equal protection clauses of the Fourteenth Amendment.

II.

QUESTIONS PRESENTED

Briefly stated the questions presented are

(a) Whether the Massachusetts statute, St. 1938, c. 478, is repugnant to the Fourteenth Amendment. (Assignments of Error Nos. 1, 2, 3, 8)

(b) Whether the rule of law in Massachusetts whereby the taxpayer's sole recourse to contest the validity or amount of local tax assessments is by abatement proceedings and whereby in order to avail himself of these he must pay all or half the tax as assessed is a rule of law repugnant to the Fourteenth Amendment. (Assignments of Error Nos. 2, 4, 5, 6)

(c) Whether assessments finally adjudged binding on the petitioner by the decision of the State Court, where petitioner has been denied any hearing as to the validity or amount thereof, are in violation of petitioner's rights under the due process and equal protection clauses of the Fourteenth Amendment. (Assignments of Error Nos. 4, 5, 13)

(d) Whether assessments made on petitioner's properties for 1938 and 1939, wherein the assessing board has purposely and arbitrarily included in their valuation of petitioner's land for each year the valuation of an asset, namely a valuable water power, which they well knew belonged to another—whether by adding the value of such asset as a separate item or by increasing in a single assessment their valuation of property actually owned by the petitioner by a further amount representing solely the valuation of such asset—are in violation of petitioner's rights under the due process and equal protection clauses of the Fourteenth Amendment. (Assignments of Error Nos. 9, 11)

(e) Whether assessments made on petitioner's property for 1938 and 1939 in the manner set out in the preceding paragraph (d) and where in addition the assessing board in each year from 1933 to 1941 both inclusive systematically and persistently assessed the same property in the same manner, namely, by adding to or including in their assessment the value of said water power, which during said entire period they well knew petitioner did not own, are in violation of petitioner's rights under the due process and equal protection clauses of the Fourteenth Amendment. (Assignments of Error Nos. 10 and 12)

Petitioner respectfully refers to the Assignments of Error which are included in the accompanying brief as more fully setting forth the questions involved.

III.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The question whether said statute, St. 1938, c. 478, is repugnant to the Fourteenth Amendment has never been and should be determined by this Court.

2. The question whether the rule of law established under the statutes and decisions in Massachusetts, whereby abatement proceedings are the taxpayer's sole recourse to obtain reduction of assessments and whereby in order to avail himself of these he must pay all or half the tax as assessed, is a rule of law repugnant to the Fourteenth Amendment has never been and should be determined by this Court.

3. The Massachusetts Court has decided another federal question of substance in a way probably not in accord with applicable decisions of this Court, namely, that a local Board of Assessors may, without violation of the Fourteenth Amendment, in each year over a period of years,

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either add to or include in their assessment of petitioner's land a definite computed amount solely for water power which they know petitioner does not own.

4. The decision of the Massachusetts Court holding said statute (St. 1938, c. 478) not repugnant to the Fourteenth Amendment is in conflict with decisions of the highest courts of other states as to similar or analogous statutes of those states.

5. An authoritative decision by this Court as to the validity of the Statute and the right of the taxpayer to a hearing without payment of tax is of special importance to a deserving portion of the public.

WHEREFORE, for the reasons set forth herein and in the brief which accompanies this petition and in the record in this case on appeal, your petitioner respectfully prays that this petition for a writ of *certiorari* be granted.

Respectfully submitted,

Burton E. Eames

BURTON E. EAMES,
Attorney for Petitioner

December 4, 1947.

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BRIEF IN SUPPORT OF PETITION

I.

OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts is reported in Massachusetts Advance Sheets 1947, page 927. Copy of said opinion is filed in the record on appeal of this case in this Court. (R. 282)

The decision of the Land Court is found in the record herein on appeal. (R. 13-45)

II.

JURISDICTION

1. The jurisdiction of this Court is invoked under Judicial Code Section 237(b) as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 937, 28 U.S.C.A. Sec. 344(b).

2. The opinion of the Supreme Judicial Court of Massachusetts was rendered September 11, 1947 and rescript transmitted to the Land Court (the trial court) on the same day. (R. 279-281) Final decree of the Land Court pursuant to said rescript was entered October 23, 1947. (R. 290)

3. In the State Court there was drawn in question the validity of a statute of Massachusetts (St. 1938, c. 478) on the ground of its being repugnant to the Fourteenth Amendment to the Constitution of the United States, and the decision was in favor of its validity. (Opinion Supreme Judicial Court R. 283)

4. There were also set up and claimed by your petitioner, in addition, certain titles, rights, privileges and immunities under the Fourteenth Amendment to the Constitution of the United States as follows:

(a) The right, under the due process and equal protection clauses of the Fourteenth Amendment, to be afforded

a hearing as to the validity and amount of local tax assessments upon its property before such assessments are finally established against it.

(b) The right, under the due process and equal protection clauses of the Fourteenth Amendment, to be afforded a hearing on questions of law involved in its local tax assessments before a judicial tribunal.

(c) The right, under the due process and equal protection clauses of the Fourteenth Amendment, where petitioner claims, as here, that his constitutional rights are being violated, to a review of both law and facts by some tribunal other than the Board which levied the assessments.

(d) The right, under the due process and equal protection clauses of the Fourteenth Amendment, to be free from assessment upon property which the Assessing Board well know is owned not by petitioner but by another, whether by adding the value of such asset as a separate item or by increasing the value of property actually owned by petitioner by a further amount representing the value of such asset and nothing else.

(e) The right, under the due process and equal protection clauses of the Fourteenth Amendment, to have its property assessed for local tax assessments in accordance with rules of law and not to be subject to deliberate, arbitrary and persistent increases by Assessors by reason of an asset not owned.

(f) The right under the due process and equal protection clauses of the Fourteenth Amendment to have its property assessed for local tax assessments on the same basis of valuation as the similar property of other taxpayers in like situation.

Your petitioner respectfully refers to the Assignment of Errors set out below in subdivision number IV hereof for a more complete statement of the rights claimed by it herein.

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III.

STATEMENT OF THE CASE

It is believed that a sufficient statement of the case has been given under heading I. "Statement of Facts" in the petition, (supra pp. 1-12) and in the interest of brevity such statement is not repeated at this point.

IV.

SPECIFICATION OF ERRORS

We submit here the same Assignment of Errors as is set out in the appeal in this case. (R. 293-298)

1. The Court erred in ruling and deciding that Chapter 478 of the Acts of the Legislature of Massachusetts for 1938 is not invalid as being repugnant to the Fourteenth Amendment to the Constitution of the United States.

2. The Court erred in ruling and deciding that, in view of the settled rule in Massachusetts that proceedings for abatement are the exclusive remedy for overassessment, which rule was expressly applied and affirmed by the Court in this cause, Chapter 478 of the Acts of the Legislature of Massachusetts for 1938, governing the only proceedings available for abatement, is not repugnant to the Fourteenth Amendment to the Constitution of the United States.

3. The Court erred in ruling and deciding that payment of approximately one-half the tax as assessed "may constitutionally be made a condition of a hearing upon an application or an appeal for abatement regardless of the financial condition of the taxpayer."

4. The Court erred in refusing to find and rule that, where by reason of the settled rule in Massachusetts, affirmed and applied by the Court in this cause, that the exclu-

sive remedy of the Appellant for review of its assessments is by proceedings for abatement under the provisions of statute and of the statutory requirement for payment of approximately one-half the tax as a condition of appeal from the Board of Assessors to the Appellate Tax Board, the Appellant has been denied any hearing as to the validity and amount of its taxes for 1938 and 1939 on Parcels 1, 2 and 3, the decision, order and decree below, sustaining such assessments and the takings of Parcels 2 and 3 based thereon, involve a depriving of the Appellant of its property without due process of law and a denial to it of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

5. The Court erred in refusing to find and rule that the assessments upon the Appellant for 1938 and 1939 on Parcels 1, 2 and 3 and the takings of Parcels 2 and 3 based thereon involve a depriving of the Appellant of its property without due process of law and a denial to it of the equal protection of the laws within the prohibitions of the Fourteenth Amendment to the Constitution of the United States and are invalid, because Appellant was denied any hearing as to the validity and amount of such assessments.

6. The Court erred in refusing to find and rule that the rule of law established by the statutes and decisions of Massachusetts, whereby the only recourse of the Appellant to secure a reduction of assessments claimed to be excessive or invalid is by proceedings under the statutes for abatement and whereby in order to proceed under said statutes the taxpayer must first pay approximately one-half the amount of the tax, is a rule of law repugnant to the Fourteenth Amendment to the Constitution of the United States, and that the assessments for 1938 and 1939 as to Parcels 1, 2 and 3 are invalid.

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7. The Court erred in refusing to find and rule that, at the times when the payments required under Chapter 478 of the Acts of the Legislature of Massachusetts for 1938 must be made as a condition of taking appeal to the Appellate Tax Board with respect to the assessments for 1938 and 1939 on Parcels designated in the petition herein as Parcels 1, 2 and 3, the Appellant was wholly unable financially to make such payments.

8. The Court erred in refusing to find and rule that, where Appellant has been denied any hearing as to the validity and amount of the assessments for 1938 and 1939 on Parcels designated in the petition herein as Parcels 1, 2 and 3, such denial of hearing being due solely to the requirement of a statute of the Commonwealth of Massachusetts (St. 1938, c. 478) that approximately one-half the tax as assessed be paid as a condition of obtaining such hearing, with which requirement the Appellant was wholly unable financially to comply, said statute is in violation of the Appellant's rights under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and said assessments for said years upon said parcels are invalid.

9. The Court erred in refusing to find and rule that the assessments for the years 1933 to 1941, both inclusive, on Parcels 1 and 2, where in the assessments for each of said years and upon each of said parcels the Assessors purposely and arbitrarily included a large amount or value for water power which the Assessors during said entire period well knew the Appellant did not own, and the taking of Parcel 2 based thereon, are invalid, being in violation of Appellant's rights under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

10. The Court erred in refusing to find and rule that the decision, order and decree in this cause, sustaining the assessments for the years 1933 to 1941, both inclusive, as to Parcels 1 and 2 and the taking of Parcel 2 based thereon, where in the making of said assessments for each of said years and as to each of said parçels the Assessors knowingly, intentionally, arbitrarily, systematically, continuously and persistently included therein a definite fixed sum amounting to many thousands of dollars in each year, solely as representing the value of water power, which said Assessors at all times during said entire period well knew Appellant did not own, involve a depriving of the Appellant of its property without due process of law and a denial of the equal protection of the laws within the prohibitions of the Fourteenth Amendment to the Constitution of the United States.

11. The Court erred in refusing to find and rule that where, in the assessments for the years 1933 to 1941, both inclusive, on Parcels 1 and 2 the Assessors purposely and arbitrarily included for each of said years and upon each of said parcels a large amount or value for water power, which the Assessors at all times during said entire period well knew the Appellant did not own, while at the same time assessing all other taxpayers in said City only for property owned by them respectively, the said assessments for each of said years and as to each of said parcels and the taking of Parcel 2 based thereon are invalid, being in violation of the Appellant's rights under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

12. The Court erred in refusing to find and rule that the decision, order and decree in this cause, sustaining the assessments for the years 1933 to 1941 both inclusive as to Parcels 1 and 2 and the taking of Parcel 2 based thereon, where in the making of said assessments for each of said

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years and as to each of said parcels the Assessors knowingly, intentionally, arbitrarily, systematically, continuously and persistently included therein a definite fixed sum amounting to many thousands of dollars in each year solely as representing the value of water power, which said Assessors at all times during said entire period well knew Appellant did not own, while at the same time assessing all other taxpayers in said city only for property owned by them respectively, involve a depriving of the Appellant of its property without due process of law and a denial to it of the equal protection of the laws within the prohibitions of the Fourteenth Amendment to the Constitution of the United States.

13. The Court erred in refusing to find and rule that the assessments for 1938 and 1939 as to Parcels 1, 2 and 3 and the takings of Parcels 2 and 3 based thereon were and are invalid.

14. The Supreme Judicial Court erred in affirming the decision of the Land Court.

V.

ARGUMENT

Summary of Argument

1. The Question Whether said Statute (St. 1938, c. 478) is Repugnant to the Fourteenth Amendment Has Never Been and Should be Determined by This Court.

2. The Question whether the rule of law in Massachusetts whereby abatement proceedings are the taxpayer's sole recourse and whereby in order to avail himself of them he must pay all or half the tax as assessed, is a rule of law repugnant to the Fourteenth Amendment Has Never Been and Should be Determined by This Court.

3. The Massachusetts Court has decided another federal question of substance in a way probably not in accord with

applicable decisions of this Court, namely—that a local Board of Assessors, without violation of the Fourteenth Amendment, may in each year, over a period of years, either add to or include in their assessment of petitioner's land a definite computed amount solely for water power which they know petitioner does not own.

4. The Decision of the Massachusetts Court holding said Statute not Repugnant to the Fourteenth Amendment is in Conflict with Decisions of the Highest Courts of other States as to Similar or Analogous Statutes of those States.

5. An Authoritative Decision by this Court as to the Validity of the Statute and the Right of the Taxpayer to a Hearing without Payment of Tax is of Special Importance to a Deserving Portion of the Public.

1. *The Question Whether said Statute (St. 1938, c. 478) is Repugnant to the Fourteenth Amendment Has Never Been and Should be Determined by This Court.*

As to the years 1938 and 1939 as to Parcels 1, 2 and 3 the petitioner, although it followed the only procedure open to it under the law of Massachusetts to obtain a reduction of its assessments, was unsuccessful and has had no opportunity for hearing at any time, before any tribunal or body, either administrative or judicial, as to the validity or amount of its assessments for those years, *solely* because it was unable to comply with the requirement that it pay one-half the tax as assessed, which was the statutory condition of its obtaining a hearing before the Appellate Tax Board.

The question of the validity of the statute (St. 1938, c. 478), which required payment in order to obtain a hearing, is directly raised in the appeal in this case.

The Massachusetts court has held this statute *not* repugnant to the due process or the equal protection clauses of the Fourteenth Amendment. That decision, we respectfully submit, is not "in accord with applicable decisions of this Court.".

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The right of the taxpayer to a hearing before the tax levied upon him becomes finally established is fundamental under the decisions of this Court. If a hearing is not afforded him at *some* time, his rights under the Fourteenth Amendment are infringed, and the assessment is void.

Pittsburgh etc. Railway v. *Backus*, 154 U.S. 421 (1894)

Weyerhaeuser v. *Minnesota*, 176 U.S. 550 (1900)

Central of Georgia Railway v. *Wright*, 207 U.S. 127, 138 (1907)

Londoner v. *Denver*, 210 U.S. 373 (1908)

Turner v. *Wade*, 254 U.S. 64 (1920)

McGregor v. *Hogan*, 263 U.S., 234, 237 (1923)

American Surety Co. v. *Baldwin*, 287 U.S. 156, 168 (1932)

Nickey v. *Mississippi*, 292 U.S. 393, 396 (1934)

Morgan v. *U.S.*, 304 U.S. 1, 14-15 (1938)

Bowles v. *Willingham*, 321 U.S. 503 (1944)

While a hearing before an administrative board may be sufficient on questions of fact, the taxpayer is entitled to have questions of law passed on by a judicial tribunal.

Ohio Valley Water Company v. *Ben Avon Borough*, 253 U.S. 287 (1920)

Wadley Southern Railway v. *Georgia*, 235 U.S. 651 (1915)

And where, as in this case, the taxpayer claims his *constitutional* rights have been violated, he is entitled to a review of both law and facts by some tribunal other than the board which levied the assessment.

Chicago, Burlington and Quincy Railroad v. *Osborn*, 265 U.S. 14 (1924)

Londoner v. *Denver*, 210 U.S. 373 (1908)

The rule as laid down by this Court is *not qualified by any conditions.* It is absolute. The hearing may be delayed, as in

Phillips v. *Commissioner,* 283 U.S. 589, 596-597 (1931)

Bowles v. *Willingham,* 321 U. S. 503, 520 (1944)

but it must be afforded him at *some* time or his rights under the Fourteenth Amendment are violated.

It is important in approaching a consideration of this statute of which we complain (St. 1938, c. 478), and of the effect of the statute and the question of its validity, to recall

(1) that abatement proceedings are the *sole remedy* of the taxpayer in Massachusetts to obtain a revision of his local tax assessment. This is shown in Appellant's "Statement as to Jurisdiction on Appeal" in this case. (R. 303-304) It is also stated in the Opinion of the Supreme Judicial Court in this case. (R. 282-283)

(2) that abatement proceedings are governed wholly by the statute, G.L. (Ter. Ed.) c. 59, s. 59 et seq. The taxpayer must first apply to the Assessors for abatement under section 59. If their decision is not satisfactory or if, as in the present case, they fail to make any decision, his only remedy is by appeal either to the County Commissioners or to the Appellate Tax Board. In *Eastern Racing Association* v. *Revere,* 300 Mass. 578 (1938) the Massachusetts Court said (per Dolan, J. pp. 581-582)

> "In creating what is now the Appellate Tax Board it was the clear intention of the legislature to establish a *comprehensive system* whereby *all appeals* from the actions of taxing authorities of the commonwealth and its municipalities *should be heard and determined by that Board.*" (Italics ours)

(3) that prior to the enactment of the statute in question, the right of appeal, either to the County

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Commissioners or to the Appellate Tax Board, was free and unqualified. There was *no* condition precedent. (*supra* p. 8)

(4) that this new statute imposed drastic limitations which had never before existed. (The impact of this new statute upon sections 64 and 65, (governing appeals) as they previously existed, is also discussed in the Petition (*supra* pp. 8-9) and can be readily seen by a glance at the statute itself. The language which was inserted in those sections by St. 1938, c. 478 is indicated in *italics* in the copy of the statute annexed to this brief, and the new section 65B is set out in full. (*infra* pp. 39-41)

(5) that petitioner was given no opportunity for hearing before the Board of Assessors and that there was no way by which he could compel a hearing, even if a hearing before the Assessors would have been sufficient. (*supra* pp. 9-10)

It seems clear, therefore, that to obstruct petitioner's appeal to the Appellate Tax Board was in reality to obstruct and prevent the hearing to which, under the decisions of this Court for the past sixty years, it was entitled as a matter of constitutional right. The denial of the right to appeal was the denial of the right to a *hearing*.

In order to appeal from the decision of the Assessors, or from their failure to decide, in other words in order to obtain the hearing to which he is entitled, the taxpayer, under section 64 or 65, as thus amended, must pay the *entire* tax as assessed or approximately that amount under the alternative provision. Under the new section 65B he must pay *one-half* that amount and must satisfy the Appellate Tax Board that he is unable to pay the balance.

These requirements as to payment are *affirmative requirements*, expressly set out in the statute. Even under section 65B he must pay (approximately) one-half the tax. There is no elasticity about this provision. It is true that if he can show to the satisfaction of the Appellate Tax

Board that he is unable to pay the balance, he may be permitted to file his appeal; but the *first* one-half of the tax *must* be paid. The requirement is absolute. This payment is a condition precedent even to his *application* to the Appellate Tax Board for *leave* to file his appeal. The statute sets up a *property qualification*. There is no saving clause to protect him who *cannot* pay.

This, we submit, is fatal to the validity of the statute under the Fourteenth Amendment. If the inability of *this petitioner* is material, we shall attempt with confidence to show that fact; but entirely apart from this petitioner's financial condition there must be many cases where one owns land which may be *assessed* for more than $1,000. but has not the necessary $500. in his pocket.

Nor is there any room in this statute for an *interpretation* which would permit a taxpayer without money to obtain the hearing which in right and justice he ought to have, without making a payment which he is unable to make. If there is no room in the statute for such interpretation and if the denial of a hearing to the taxpayer, who could not fulfill the condition, results in depriving him of his constitutional rights, then the statute must fall.

In *United States* v. *Ju Toy*, 198 U.S. 253 (1905), the Court said, per Holmes, J. at pages 262-263,

> "The relevant portion (of the statute) being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces, or altogether void. An exemption of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again. *United States* v. *Reese*, 92 U.S. 214, 221; *Trade-Mark Cases*, 100 U.S. 82, 98, 99; *Allen* v. *Louisiana*, 103 U.S. 80, 84; *United States* v. *Harris*, 106 U.S. 629, 641, 642; *Virginia Coupon Cases*, 114 U.S. 269, 305; *Baldwin* v. *Franks*, 120 U.S. 678, 685-689; *Smiley* v. *Kansas*, 196 U.S. 447, 455."

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The exemption of the taxpayer who is financially embarrassed cannot be read into the statute "merely for the purpose of saving what remains", and the statute must fall as a whole.

2. The Question Whether the Rule of Law in Massachusetts, whereby Abatement Proceedings Are the Taxpayer's Sole Recourse and Whereby in Order to Avail Himself of Them he must Pay all or half the tax as assessed, is a Rule of Law Repugnant to the Fourteenth Amendment has never been and should be determined by this Court.

It may be said that the inability of the petitioner in this case to obtain any hearing as to the validity or amount of its assessments for 1938 or 1939 upon Parcels 1, 2 or 3 is due to two things: *first*, the settled rule in Massachusetts that abatement proceedings are the exclusive remedy of the taxpayer to correct invalid or excessive assessments, and *second*, the provisions of the statute complained of which injected into the statutes governing such proceedings the condition that approximately all or one-half the tax as assessed must be paid in order to have access to the Appellate Tax Board; and it may be said that if either of these rules were changed, the difficulty might be removed.

In other words it may be said that the violation of petitioner's rights under the Fourteenth Amendment is due to the combination of these two principles.

It is apparent, however, that in this case the opinion of the Supreme Judicial Court of Massachusetts expressly holds adversely to your petitioner upon *both* points; for it holds (1) that "the only remedy of the respondent was by a petition for abatement" (Opinion, R. 282-283) and (2) that the statute is not repugnant to the Fourteenth Amendment. In the language of the Massachusetts Supreme Court

> "It is settled that such a payment may constitutionally be made a condition of a hearing upon an application or an appeal for abatement regardless of the financial

> condition of the taxpayer. *Old Colony Railroad* v. *Assessors of Boston*, 309 Mass. 439; *Lincoln Hotel Co.* v. *Assessors of Boston*, 317 Mass. 505. We remain satisfied with those decisions which are decisive as to the present objections raised by the respondent." (Opinion R. 283)

As we have shown in our "Statement as to Jurisdiction on Appeal" (R. p. 302) the cases cited by the Massachusetts Court involved the same statute here in issue, and both cases dealt specifically with the taxpayer's objections under the due process and equal protection clauses of the Fourteenth Amendment and held that statute valid.

Thus it was on the definite assumption or basis that abatement proceedings were the sole remedy which was available to the taxpayer that the statute was held to be valid.

We respectfully submit that if this situation presents a federal question which does not involve strictly and solely the question whether the statute itself is repugnant to the Fourteenth Amendment, that question is whether the *rule of law* established by the statutes and decisions of Massachusetts, whereby (1) the only recourse of petitioner to secure a reduction of taxes claimed to be excessive or invalid is by proceedings under the statutes for abatement and whereby (2) in order to proceed under said statutes the taxpayer must first pay all or one-half the amount of the tax as assessed, is a rule of law repugnant to the Fourteenth Amendment to the Constitution of the United States; and that this question in its entirety has not been and should be determined by this Court.

On this question we respectfully refer the Court to the authorities and arguments in the preceding division of this brief.

3. The Massachusetts Court Has Decided Another Federal Question of Substance in a Way Probably Not in Accord with Applicable Decisions of this Court, namely, that a local Board of Assessors, without violation of the

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Fourteenth Amendment, may in each year, over a period of years, either add to or include in their assessment of petitioner's land a definite computed amount solely for water power which they know petitioner does not own.

The State Court has upheld the assessments on Parcels 1 and 2 as valid notwithstanding that it clearly appeared that the Assessors for each year from 1933 to 1941, both inclusive, had included in their valuation of each of said parcels an item of twenty cents a square foot for water power which during said entire period they well knew petitioner did not own. This was an excess assessment in each year of nearly $18,000. on Parcel 1 and nearly $10,000. on Parcel 2. (supra p. 6)

Both the Land Court (R. 26) and the Supreme Judicial Court Opinion (R. 282-283) appeared to regard these over-assessments as entirely legal, on the ground that the water power "was not assessed as a separate piece of property" but had been treated merely as "enhancing" the value of the land and concluded that petitioner's only remedy therefore was by petition for abatement. It should be noted, however, that this is not a mere case of mistaken judgment of values. Here the Assessors did not in any true sense make an assessment or valuation of petitioner's land. What they called their "assessed value" in this case is made up of (a) their estimate of the value of petitioner's land plus (b) a further amount representing what they deemed to be the value of another asset which they were fully aware belonged wholly to someone else.

In *United States* v. *County of Allegheny, Pennsylvania,* 322 U.S. 174 (decided May 1, 1944) it appeared that it had long been the practice in Pennsylvania, in imposing a tax upon land, to treat machinery installed on the land as merely "enhancing" the value of the land and to reach the machinery for taxation in this manner. Under this practice the county authorities assessed land of the Mesta Company and included in its assessment the value of certain machinery on

the property, which in fact belonged to the United States. This Court said (p. 185)

> "We discern little theoretical difference, and no practical difference at all, between what was done, and what would be done if the machinery were taxed in form. Its full value was ascertained and added to the base to which the annual rates would apply—We hold that the substance of this procedure is to lay an *ad valorem* general property tax on property owned by the United States."

Of course the right which was impaired in the Mesta case was the right of the government to be exempt from local taxes upon its property. In the case at bar the right which is impaired is the right of the petitioner to be exempt from assessment upon property it did not own. In the Mesta case the property included in the assessment was in fact situated on the land. In the case at bar the water power had been wholly detached from the petitioner's land and was no longer appurtenant to it. Legally and in fact it was no longer there. It had been made appurtenant to the land of another.

The same element of illegality is present in these assessments as was present in *Great Northern Railway v. Weeks*, 297 U.S. 135 (1936) where this Court held that the failure of the assessing Board to consider

> "the enormous diminution in value of the petitioner's property caused by the 1929 collapse and the progress of the depression,"

which the Court held were matters of judicial notice,

> "is, within the principles of our decisions, the equivalent in law of intention to make a grossly excessive assessment for 1933 in disregard of petitioner's rights under the due process clause of the Fourteenth Amendment."

An overassessment purposely made by including in their valuation an asset which they knew was owned by another

would appear to be quite as "purposeful" as one made in disregard of a well known enormous diminution of values. Indeed the two cases have striking elements of similarity. In the *Great Northern Railway* case the "single valuation" of the land had not been diminished as it should have been. In the case at bar the "single valuation" of the land had been deliberately and arbitrarily increased by adding (or including) a value for water power which no one could seriously claim should have been either added to or included in it. Indeed the case at bar is much stronger than the *Great Northern* case in that in the present case we find deliberate and long continued overloading of the assessments.

In the *Great Northern Railway* case, Mr. Justice Stone with whom Mr. Justice Brandeis and Mr. Justice Cardozo agreed, dissented on the ground that the petitioner had not shown that the tax was discriminatory. But the element of discrimination is present in the case at bar.

Although, as to Parcels 1 and 2, the Assessors undertook to assess petitioner for a valuable asset which they knew it did not own, it remains, as we submit, a clear presumption that they did *not* undertake to practice this method with other taxpayers. It cannot be conceived that it is the practice of the Assessors of Lowell or of any other Assessors to assess to A a water power or any other asset which they *know* belongs to B. The maxim *res ipsa loquitur* would seem to be pertinent, in an application perhaps novel but eminently sound.

The *Great Northern Railway* case, therefore, is still a valid precedent for the illegality of these assessments. The discrimination, the absence of which led to the dissent, is *not* lacking here.

There are a number of other cases in which this Court has held that, where the property of one owner is intentionally and arbitrarily assessed on a higher basis of valuation

than is similar property of others, there is denial of equal protection.

Sioux City Bridge Company v. *Dakota County*, 260 U.S. 441 (1923)

Cumberland Coal Company v. *Board of Revision*, 284 U.S. 23 (1931)

In *Hillsborough* v. *Cromwell*, 326 U.S. 620 (1946) this Court said, per Douglas, J. p. 623

> "The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed upon others of the same class. The right is the right to equal treatment."

Where such treatment is systematic and long continued it would seem the proof of discrimination is apparently more easily established, but if it appears to be purposeful or deliberate, that is enough.

Mackay Telegraph etc. Company v. *Little Rock*, 250 U.S. 94 (1919)

Snowden v. *Hughes*, 321 U.S. 1 (1944)

In the latter case the Court said, Stone C. J. (pp. 9-10)

> "Such discrimination may also be shown to be *purposeful* and hence denial of equal protection *even though it is neither systematic nor long continued*. Cf. *MacFarland* v. *American Sugar Co.*, 241 U.S. 79." (Italics ours)

In the present case this deliberate overassessment covered the entire period from 1933 to 1941; and five of those years were before 1938.

4. The Decision of the Massachusetts Court holding said Statute not Repugnant to the Fourteenth Amendment is in Conflict with Decisions of the Highest Courts of other States as to Similar or Analogous Statutes of those States.

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A statute of Maine which required a deposit of taxes, interest and costs before the owner of the land could commence or defend a suit to contest the validity of the assessment and sale of his land for taxes was before the Supreme Court of Maine in *Bennett* v. *Davis*, 90 Maine 102 (1897). The statute was held unconstitutional, being in violation not only of the Constitution of Maine but also of the due process clause under the Fourteenth Amendment to the Constitution of the United States. The Court said, p. 105:

> "While the legislature may regulate the use of legal remedies, may require the payment of various fees, and may require security to be given for fees and costs, the requirement of this statute is not within either category. This requirement practically is that before he 'begins' his action, or his defense, he shall pay into court the whole sum claimed against him including interest and costs. With such an obstacle placed in his way by the legislature, the citizen can not be truly said to have remedy by due course of law, or to have right and justice administered to him freely and without sale. As well might the legislature undertake to enact that no defendant shall begin his defense until he pays into court the whole sum demanded of him. It is not what has been done, or ordinarily would be done under a statute, but what might be done under it that determines whether it infringes upon the constitutional right of the citizen. The constitution guards against the chances of infringement. It is evident that under this statute the citizen might in some cases be practically deprived of all remedy."

This Maine statute did not even require payment of the tax but merely the *deposit* of the necessary funds in court.

The statement as to the conflict between this statute and both the state constitution and the Fourteenth Amendment was repeated as recently as 1941 in *Warren* v. *Norwood*, 138 Maine 180, 196 (1941) and see also *Vigue* v. *Chapman*, 138 Maine 206, 211 (1941).

A statute of Illinois provided that a party could not question a tax title set up against him without first showing

he had paid all taxes due and assessed on the lot. In *Wilson* v. *McKenna*, 52 Ill. 43 (1869) the Court (Breese, C. J.) said (pp. 48-49) that this statute had

> "long remained a dead letter upon the statute book and is not considered of any validity, the effect of it being to compel a man to buy justice. This no one can be compelled to do under our organic law * * * Should justice be denied to him who has not wherewithal to pay for it? The conditions imposed by this act deprive a poor man of justice and has no sanction in the constitution."

In *Reed* v. *Tyler*, 56 Ill. 288, 292 (1870) the case of *Wilson* v. *McKenna* was cited with apparent approval, and as recently as 1922 in *City of Chicago* v. *Collin*, 302 Ill. 270, 273 both *Wilson* v. *McKenna* and *Reed* v. *Tyler* were cited with apparent approval.

A somewhat similar but slightly more drastic statute was involved in *Weller* v. *St. Paul*, 5 Minn. 95 (1860) and was held unconstitutional as requiring the aggrieved party to purchase the right to his status in Court. The Court said (Atwater, J., p. 101)

> "I can conceive of no other object of this provision than to make it more onerous and difficult for persons to contest the validity of city assessments, a difficulty which, perhaps in many cases, might amount to an entire denial of justice. This object is unconscionable and unjust, and inconsistent with the provisions of the Constitution."

5. An Authoritative Decision by this Court as to the Validity of the Statute and the Right of the Taxpayer to a Hearing without Payment of tax is of Special Importance to a Deserving Portion of the Public.

The situation facing the taxpayer is calculated to delay, discourage and make difficult if not impossible any test of the validity of the statute by any owner of land who is without funds, and an authoritative decision is, therefore, of special importance to any who are or may be so situated.

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The way of the taxpayer who is without the necessary funds to comply with the statute is indeed hard. In the first place if his tax is over $1,000. and he cannot pay the $500. required by the statute, how could he possibly finance a contest of its validity? This petitioner was fortunate in being able to make a lease late in 1939 which, although it did not enable it to make the payment required by the statute on the 1939 tax (one-half of nearly $14,000.—Ex. 86-88; Evid. R. 212) did yield rentals thereafter which have enabled it to avoid a final surrender of its rights. (Evid. R. 218-219) But such an outcome cannot ordinarily be expected. This petitioner has indeed been fortunate in that respect.

The unfortunate taxpayer who is without funds obviously cannot appeal if the statute is to control. A hearing before the Assessors, if he is fortunate enough to obtain it, could settle only questions of fact, and if he claimed the assessment was *illegal*, he would find himself denied the hearing to which he is entitled, that is before the Appellate Tax Board.

No course would be open to him, therefore, but to wait. If he lacks the money, obviously he could not pay the tax and sue to get it back. If the Collector should elect to bring suit against him for the tax, which he may do after three months from the time it is committed to him (G.L. (Ter. Ed.) c. 60, s. 35), he could set up all his contentions in defense to the suit, *if* he had the money with which to defend. Suit, however, is seldom resorted to for collection of tax on real estate, as sale (or taking) is considered a more effective means.

Nichols on Taxation in Massachusetts (3rd Ed.) p. 382

And a sale or taking is ordinarily not used as a practical matter until about a year after a demand has been made.

Nichols on Taxation in Massachusetts (3rd Ed.) p. 385

If, after the usual delay, the Collector should see fit to sell or "take" his property under G.L. (Ter. Ed.) c. 60, s. 37, 40, 53-55 a period of *two years* must elapse before the purchaser or the City could seek foreclosure (G.L. (Ter. Ed.) c. 60, s. 65). This would be the next opportunity afforded him to set up his contentions as to illegality. The question of the *amount* of assessment would not be open either on suit by the Collector or in foreclosure proceedings. *Garden Cemetery Corp.* v. *Baker*, 218 Mass. 339. *Nichols on Taxation in Massachusetts* (3rd Ed.) pp. 387, 395. The taxpayer who is poor must, therefore, be subject to uncertainty and anxiety for an uncertain period of time which may run into years, and unless his fortunes have taken a radically favorable turn, he *could not afford the expense* of defending either against a *suit* by the Collector for the tax or against a *foreclosure petition* following the taking.

We have not considered in the above discussion the question of resorting to the federal courts by equity proceedings. That, too, would entail substantial expense, and the remedy for illegal taxation ought to be found in the courts of the state without invoking the federal jurisdiction.

If we may assume for purposes of argument that the statute *is* actually repugnant to the Fourteenth Amendment, then the taxpayer who is "land poor", who owns land but is unable to pay one-half the amount of the tax assessed, will be in danger of losing that which he has, and the injujstice, if there be injustice, will thus be perpetuated unless and until the questions herein presented are authoritatively adjudicated by this Court.

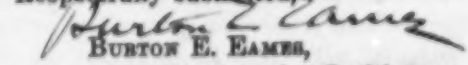
As to any taxpayer who is able financially to comply with the statute, he will in all probability do so for his own self-protection. If he can comply, why should he run risks? Full compliance with the statute would be his conservative course; but so far as the state law is concerned, the taxpayer without money is faced with difficulties which it is very doubtful if he can overcome. Claiming constitutional rights, he is unable to assert them, and constitutional rights should *not* be allowed to lapse or fail by *default*.

VI.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



BURTON E. EAMES,
Attorney for Petitioner

APPENDIX A.

St. 1938, c. 478

(This statute amended General Laws, Chapter fifty-nine, sections sixty-four and sixty-five, by inserting additional provisions. It also added a new section designated sixty-five B. In the following the *language inserted by this statute in sections sixty-four and sixty-five is italicized.* If we omit the italicized words, we have sections sixty-four and sixty-five substantially as they previously existed.*)

AN ACT RELATIVE TO ABATEMENT OF CERTAIN TAXES.

Whereas, The deferred operation of this act would tend to defeat its purpose, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted, etc., as follows:

Section 1. Chapter fifty-nine of the General Laws is hereby amended by striking out section sixty-four, as most recently amended by section six of chapter four hundred of the acts of nineteen hundred and thirty-seven, and inserting in place thereof the following:—*Section 64.* A person aggrieved by the refusal of assessors to abate a tax *on personal property which has been paid, or a tax of not more than one thousand dollars on a parcel of real estate, or a tax of more than one thousand dollars on a parcel of real estate which tax either has been paid or on account of which there has been paid a sum not less than the amount which would be assessable in said year upon a valuation equal to the average of the valuations of said parcel, as reduced by reason of abatements, if any, for the three years*

*The only exceptions were the following:—in line 16 of Section 1 the words "section sixty-three" were substituted for "the preceding section" and in line 8 of Section 2 the words "Appellate Tax Board" were substituted for "Board of Tax Appeals."

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next preceding said year, may, within sixty days after receiving the notice provided in section sixty-three, or within ninety days after the time when the application for abatement is deemed to be refused as hereinafter provided, appeal therefrom by filing a complaint with the clerk of the county commissioners, or of the board authorized to hear and determine such complaints, for the county where the property taxed lies, and if on hearing the board finds that the property has been overrated, *and that the complainant has complied with all applicable provisions of law,* it shall make a reasonable abatement and an order as to costs. Whenever a board of assessors, before which an application in writing for the abatement of a tax is or shall be pending, fails to act upon said application, except with the written consent of the applicant, prior to the expiration of four months from the date of filing of such application it shall then be deemed to be refused *and the assessors shall have no further authority to act thereon; provided, that during the period allowed for the taking of an appeal the assessors may by agreement with the applicant abate the tax in whole or in part in final settlement of said application, and shall also have the authority granted to them by section seven of chapter fifty-eight A to abate, in whole or in part, any tax as to which an appeal has been seasonably taken.* If the list of personal property required to be brought in to the assessors was not brought in within the time specified in the notice required by section twenty-nine, no tax upon personal property shall be abated unless the board appealed to finds good cause for this delay or unless the assessors have so found as provided in section sixty-one, or unless such tax exceeds by fifty per cent the amount which would have been assessed on such estate, if the list had been seasonably brought in, and in such case only the excess over such fifty per cent shall be abated. A tax or assessment upon real estate may be abated although no list of property was brought in within the time specified by the notice re-

quired by section twenty-nine; provided, that the application for an abatement of such tax or assessment included a sufficient description of the particular real estate as to which an abatement is requested.

Upon the filing of a complaint under this section the clerk of the county commissioners or of the board authorized to hear and determine the same shall forthwith transmit a certified copy of such complaint to the assessors and the assessors or the city solicitor or town counsel may within thirty days after receipt of said copy give written notice to said clerk and to the complainant that the town elects to have the same heard and determined by the appellate tax board. Thereupon, the clerk of the county commissioners or of the board authorized to hear and determine such complaints shall forward all papers with respect to such complaint then in the file of the county commissioners or other such board to the clerk of the appellate tax board and proceedings with respect to such complaint shall thenceforth be continued as provided in chapter fifty-eight A. If upon hearing *it appears that the complainant has complied with all applicable provisions of law and* the appellate tax board finds that the complainant is duly entitled to an abatement, it may grant him such reasonable abatement as justice may require, and shall enter an order directing the treasurer of the town to refund said amount, if the tax sought to be abated has been paid, together with all charges and interest at five per cent on the amount of the abatement from the date of the payment of the tax. The board may make such order with respect to the payment of costs as justice may require.

Section 2. Said chapter fifty-nine is hereby further amended by striking out section sixty-five, as most recently amended by section one of chapter one hundred and sixty-seven of the acts of nineteen hundred and thirty-three, and inserting in place thereof the following:—*Section 65.* A person aggrieved as aforesaid may, instead of pursuing

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the remedy provided in section sixty-four, but subject to the same conditions, appeal to the appellate tax board by filing a petition with such board within sixty days after receiving the notice required by section sixty-three, *or within ninety days after the time when the application for abatement is deemed to be refused as provided in section sixty-four.* Such appeal shall be heard and determined by said board in the manner provided by chapter fifty-eight A. The board may enter such order as justice may require in the manner provided in the preceding section with respect to complaints removed from the county commissioners.

Section 3. Said chapter fifty-nine is hereby further amended by inserting after section sixty-five A the following new section:—*Section 65B.* A person aggrieved by the refusal of assessors to abate a tax of more than one thousand dollars on a parcel of real estate, on account of which tax there has been paid either a sum not less than one-half of the amount of such tax or a sum not less than one-half of the amount which would be assessable in said year upon a valuation equal to the average of the valuations of said parcel, as reduced by reason of abatements, if any, for the three years next preceding said year, who claims to be unable presently to pay the amount of tax remaining unpaid, may, within sixty days after receipt of the notice provided in section sixty-three, or within ninety days after the time when the application for abatement is deemed to be refused as provided in section sixty-four, petition the appellate tax board for leave to file an appeal therefrom to said board. Such petition shall allege that the petitioner is unable presently to pay such amount of tax, and that, except for failure to comply with the provision of section sixty-four relative to payment of such tax, the petitioner is entitled to an appeal under section sixty-five, and shall be filed with the clerk of the appellate tax board. A notice of the filing of such petition shall be given by said clerk to the appropriate assessors within five days from the date of

the filing of such petition, in such form and in such manner as the appellate tax board shall by rule provide, and a hearing, due notice of which shall have been given, shall be had on such petition not later than twenty days from the date of the filing thereof. Such petition shall be heard by a single member of said board. If such member finds the allegations in such petition to be true, he may, by order, grant leave to such petitioner to file such appeal, within ten days from the entry of said order, upon such conditions as may be imposed therein, which may require such petitioner to pay, in whole or by installments, the amount of the tax remaining unpaid, as a prerequisite to any hearing on the merits of the appeal filed under said order. If the complainant fails to comply with any of the conditions imposed in said order an appeal filed thereunder may, upon motion, be dismissed by any member of said board. If the complainant complies with the conditions imposed in said order the appeal filed thereunder shall thereafter be heard and determined by said board in the manner provided by chapter fifty-eight A. The board may enter such order as justice may require in the manner provided in section sixty-four with respect to complaints removed from the county commissioners.

(Section 4 is omitted.)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 449

MARDEN & MURPHY, INC.,

Appellant,

vs.

CITY OF LOWELL, MIDDLESEX COUNTY, MASSACHUSETTS

APPEAL FROM THE LAND COURT OF THE COMMONWEALTH OF MASSACHUSETTS

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

P. Harold Ready,
Raymond D. O'Brien,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 449

MARDEN & MURPHY, INC.,

Appellant,

vs.

CITY OF LOWELL,

Appellee.

MOTION TO DISMISS OR AFFIRM

Now comes the City of Lowell, the appellee in the above-entitled appeal, and moves that said appeal be dismissed, or the decision and decree appealed from be affirmed, for the reasons set forth in the appellee's Statement Opposing Jurisdictional Statement filed herewith.

CITY OF LOWELL,
By P. HAROLD READY,
City Solicitor,
and
RAYMOND D. O'BRIEN,
Attorney.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 449

MARDEN & MURPHY, INC.,

Appellant,

vs.

CITY OF LOWELL,

Appellee.

STATEMENT OPPOSING JURISDICTION

The City of Lowell, appellee in the above-entitled appeal, believing that the matter set forth below will demonstrate that its motion to dismiss or affirm should be allowed files this, its statement in opposition to Appellant's statement as to jurisdiction.

This case arises from a petition filed in the Massachusetts Land Court by the City of Lowell for the foreclosure of all right of redemption under four tax titles acquired by that city in August, 1942, for the nonpayment of the taxes assessed in the years 1933 to 1941, inclusive, upon four parcels of real estate in Lowell, Massachusetts. Marden & Murphy, Inc., the owner of the four parcels, answered, denying the validity of the tax titles. From a decision of the Land Court holding the tax title on the first parcel to be invalid but the tax titles on the other parcels to be

valid, both the City of Lowell and Marden & Murphy, Inc. appealed to the Supreme Judicial Court of Massachusetts, which affirmed the decision of the Land Court. The appeal now before this Honorable Court was taken by Marden & Murphy, Inc. from the decree entered by the Land Court upon receipt of the Supreme Judicial Court's rescript.

I

Appellee's motion to dismiss or affirm should be allowed as to Parcel 1 (in the original petition to foreclose) because the original petition to foreclose has been dismissed as to that parcel.

The decision of both the Land Court and the Supreme Judicial Court as to Parcel 1 was in favor of the appellant and held the City's tax title thereon to be invalid; and the Land Court's final decree dismisses the City's petition to foreclose as to said Parcel 1. The appellant is therefore not a party aggrieved in this respect and is not entitled to prosecute this appeal as to that parcel. *New York Telephone Company* v. *Maltbie,* 291 U. S. 645. *Lindheimer* v. *Illinois Bell Telephone Company,* 292 U. S. 151, 176.

If the City of Lowell proceeds to acquire a new tax title on Parcel 1, as appellant in its statement favoring jurisdiction suggests, the new tax title will be the basis of a new petition for foreclosure and hence a new and separate court action which appellant can defend and, if aggrieved, appeal.

II

Appellee's motion to dismiss or affirm should be allowed as to Parcel 4 (in the original petition to foreclose) because none of the errors assigned by the appellant relate to Parcel 4.

The Assignment of Errors filed with the appeal in the instant cause relate to Parcels 1, 2 and 3, but not to Parcel

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4. The prayer at the end of the Petition for Appeal asks for no relief as to Parcel 4. We submit that it follows that appellee's motion to dismiss should be allowed as to parcel 4.

III

Appellee's motion to dismiss or affirm should be allowed insofar as the appeal attacks assessments for the years 1933 to 1941, inclusive, on the ground that the action of the local assessors violated the appellant's rights under the Fourteenth Amendment.

The Assignment of Errors accompanying the appeal of Marden & Murphy, Inc. to this Court sets forth some fourteen alleged errors. Generally speaking, the alleged errors may be said to fall into two categories: (1) those which attack the validity of certain 1938 and 1939 taxes on the ground that Mass. St. 1938, c. 478, violates the Fourteenth Amendment to the Constitution of the United States, and (2) those (Nos. 9, 10, 11 and 12) which attack certain assessments for the years 1933 to 1941, inclusive, on the ground that the action of the local assessors violated the Appellant's rights under the Fourteenth Amendment.

The latter do not attack any State statute as repugnant to the Federal Constitution, but are directed simply against the administration of State statutes. As was said by this Court in *Charleston Federal Savings and Loan Association* v. *Alderson*, 324 U. S. 182, 187, an appeal under Section 237 (a) of the Judicial Code (and the instant one is such) may be dismissed where the appellant fails to attack a statute explicitly in its assignment of errors.

Treating the paper on which the appeal was allowed as a petition for a writ of certiorari, certiorari should not be granted as to Nos. 9, 10, 11 and 12 in the Assignment of Errors. Appellant's jurisdictional statement does not argue

that it should, but is peculiarly silent with respect to these alleged errors. Under the heading "The Statutory Provisions as they existed before St. 1938, c. 478," however, appellant's jurisdictional statement does state with reference to remedies available with respect to taxes for 1933 to 1937, inclusive: "It is not questioned but that these remedies were fair and adequate." The Record (p. 26) shows that the assessments for the years 1936 and 1937 were reduced by the Board of Tax Appeals, that in 1940 and 1941 a reduction of the assessment was agreed to by the parties and confirmed by the Appellate Tax Board, and that Marden & Murphy, Inc. admitted before the Land Court that it has no cause for complaint of over-valuation in those years. Further, the Land Court found that land which had been valued by the Assessors at seventy-five cents a square foot had been over-valued at the most not more than twenty cents a square foot. R., pp. 24, 26. To value land worth fifty-five cents a square foot or more, at seventy-five cents a square foot is certainly not confiscation. Where real estate values are involved, two equally conscientious and honest experts have often been known to vary far more than twenty cents a square foot. To sum up, appellant's remedies with respect to 1933, 1934, 1935, 1936 and 1937 were fair and adequate upon its own admission. With respect to 1938 and 1939 the action of the local assessors was not confiscatory but fully within the realm of honest difference of opinion as to value. In the Appellate Tax Board proceedings the appellant agreed to the 1940 and 1941 values it now seeks to contest. Under the circumstances, we submit, certiorari should not be granted as to Nos. 9, 10, 11 and 12 in the Assignment of Errors.

Appellant's jurisdictional statement cites two opinions of this Court: *Ohio Valley Water Co.* v. *Ben Avon Borough*, 254 U. S. 287, and *Chicago, Burlington & Quincy Railroad*

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Co. v. *Osborne*, 265 U. S. 14. In the *Ohio Valley Water Co.* case, which was a utility rate case, this Court said:

> "In all such cases, if the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to other law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment."

The case at bar concerns the ordinary annual tax upon real estate, not the rates of a utility company. When this class of taxes has been involved, the proceedings have been construed with the utmost liberality and have been held to violate the Fourteenth Amendment only where they are arbitrary, oppressive or unjust. *Glidden* v. *Harrington*, 189 U. S. 255, 258. Further, the Land Court in the present case did not exclude evidence of value, but considered it and made findings with respect to it to which attention has already been called (R., pp. 24, 26). The Land Court found the twenty-cent variance to be a mere over-valuation, the exclusive remedy for which was by proceeding by abatement (R. p. 26). Thus, in the case at bar, a judicial tribunal did determine upon its own independent judgment as to both law and facts whether the taxes were confiscatory.

Chicago, Burlington & Quincy Railroad Co. v. *Osborne*, 265 U. S. 14, arose upon a bill in equity brought in a District Court of the United States to restrain the collection of taxes assessed under State statutes. There was no provision in the State statutes by which the person assessed could pay under protest and bring an action at law. The only remedy given by those statutes was a writ of error to take to the State Supreme Court a record prepared by the assessing board. In Massachusetts, several remedies are available to a taxpayer whose complaint is that a tax is wholly illegal. He

may pay the tax under a written protest and bring an action against the municipality to recover back the money paid (Mass. G. L. (Ter. Ed.) c. 60, s. 98); or he may set up the illegality as a defense to an action by the tax collector. *Harrington* v. *Glidden*, 179 Mass. 486, 492. There may even be other remedies such as an action of tort against the assessors where such an action will lie. *Harrington* v. *Glidden*, 179 Mass. 486, 492. Thus, the system of taxation condemned in the *Osborn* case is so entirely different from that in Massachusetts, that the *Osborne* case cannot be said to indicate that a substantial Federal question is presented by the case at bar. Furthermore, the question in the *Osborne* case was not whether the State system of taxation was constitutional, but whether a Federal court should exercise equity jurisdiction in a particular situation and issue a preliminary injunction. The test of equity jurisdiction in a Federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the State courts. *Risty* v. *Chicago, Rock Island & Pacific Railway Co.*, 270 U. S. 378, 388, citing the *Osborn* case. We, therefore, respectfully submit that neither of the cases cited by the appellant militates against appellee's position on alleged errors Nos. 9, 10, 11 and 12.

IV

Appellee's motion to dismiss or affirm should be allowed insofar as appeal relates to St. 1938, c. 478, because the jurisdictional statement fails to show that the nature of the case is such as to bring the case within the jurisdictional provisions relied on.

Rule 12 of the Rules of this Court relates to jurisdictional statements. Paragraph 1 of that rule provides in part as follows:

> "The statement shall show that the nature of the case and the rulings of the court were such as to bring

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the case within the jurisdictional provisions relied on and shall cite the cases believed to sustain jurisdiction."

St. 1938, c. 478, requires payment as a condition precedent to an appeal to the Appellate Tax Board (of Massachusetts) with respect to a tax on personal property and with respect to a tax of more than one thousand dollars on a parcel of real estate. Under the statute cited, such an appeal may be taken with respect to a tax of not more than one thousand dollars on a parcel of real estate even though no part of the tax has been paid. The appellant's jurisdictional statement does not show that the 1938 and 1939 taxes which are involved in the instant appeal are more than $1,000 on any parcel of real estate. We, therefore, respectfully suggest that the appellant has failed to comply with the above-quoted provision of Rule 12.

V

Appellee's motion to dismiss or affirm should be allowed insofar as appeal relates to St. 1938, c. 478, because the jurisdictional statement does not have appended to it earlier opinions, reference to which is necessary to ascertain the grounds of the decree.

Paragraph 1 of Rule 12 of the Rules of this Court further provides in part as follows:

> "The applicant shall append to the statement a copy of any opinions delivered upon the rendering of the judgment or decree sought to be reviewed, including earlier opinions in the same case, or opinions in companion cases, reference to which may be necessary to ascertain the grounds of the judgment or decree."

The present appellant appended to its jurisdictional statement only the opinion of the Supreme Judicial Court in this cause. As more fully appears from the first para-

graph of Part IV of the appellant's jurisdictional statement, the Supreme Judicial Court in that opinion cited *Old Colony Railroad Co.* v. *Assessors of Boston*, 309 Mass. 439, and *Lincoln Hotel Co.* v. *Assessors of Boston*, 317 Mass. 505, and then said: "We remain satisfied with those decisions, which are decisive as to the present objection raised by the respondent." We respectfully suggest that reference to those opinions is necessary to ascertain the grounds of the present decision.

The appellant also failed to append the decision of the Land Court in the case at bar. That decision read in part as follows:

> "The respondents contend that they have been barred from obtaining any review by the Appellate Tax Board as to the validity and amount of the assessments for the years 1938 and 1939. They state that they do not argue that Chapter 478 of the Acts of 1938 is unconstitutional. In fact they concede that the Supreme Judicial Court in *Old Colony Railroad Company* v. *Assessors of Boston*, 309 Mass. 439 and *Lincoln Hotel Company* v. *Assessors of Boston*, 317 Mass. 505, have held this chapter to be constitutional. They further argue, however, that 'they do not wish to be understood as conceding the constitutionality of the statute' and say: 'If it is material in any way in this case, we earnestly contend that it violates the "due process" and "equal protection" provisions of the fourteenth amendment to the Constitution' " (R. p. 29).
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>
> "Thus the evidence which was introduced tending to prove that Marden & Murphy, Inc. was unable to comply with the provisions of St. 1938, c. 478, s. 3 as to payment is immaterial. If it should be material, however, it cannot be found as a fact on all the evidence that Marden & Murphy, Inc. was unable to comply with the provisions of said statute as to payment. Exhibits 89 and 90 are statements of condition of Marden &

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Murphy, Inc. for various months in 1938, 1939 and 1940. An examination of these statements discloses that from the cash on hand alone, without considering the other assets of the corporation, the provisions of the statute in regard to payment as to parcels 2 and 3 could have been complied with, and that from the other assets of the corporation arrangements might have been made to secure the necessary money to comply with the provisions of the statute in regard to payment as to parcel 1" (R., pp. 29, 30).

In that portion of appellant's jurisdictional statement headed "Appellant's Contentions Below and the Rulings Thereon", the appellant more than once mentions its inability to make the payments required by St. 1938, c. 478. It is obvious that these statements are not in conformity with the Land Court's findings just quoted. We therefore respectfully urge that reference to the Land Court's opinion is necessary to ascertain the grounds of its decree and consequently that under the Rule quoted the Land Court's opinion should have been appended to the appellant's jurisdictional statement.

VI

Appellee's motion to dismiss or affirm should be allowed insofar as the appeal relates to St. 1938, c. 478, because the jurisdictional statement fails to show that the appellant is one of the class affected by that statute.

It is established that one who assails a statute as unconstitutional must show that he is injuriously affected thereby. *Mallinckrodt Works* v. *St. Louis*, 238 U. S. 41, *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544. As just stated under V, the Land Court said: "* * * it cannot be found as a fact on all the evidence that Marden & Murphy, Inc. was unable to comply with the provisions of said statute as to payment" (R., p. 30). Under the circum-

stances, we suggest, the appellant has not shown that it has been injuriously affected by the conditions as to payment imposed by St. 1938, c. 478.

VII

Appellee's motion to dismiss or affirm should be allowed in so far as the appeal relates to St. 1938, c. 478, because the Federal question involved is not substantial for that the requirements of the Fourteenth Amendment have been satisfied in the instant case by the statutes providing for a hearing before the Assessors of Lowell.

It is important to note that, so far, at least, as the appellant is concerned, the conditions precedent to an application to the local assessors for an abatement are materially different from those precedent to an appeal to the Appellate Tax Board. The appellant was not required to pay the tax, or any part of it, before applying to the appellee for an abatement. Mass. G.L. (Ter. Ed.) c. 59, s. 59, and amendments thereto; see also *Boston Five Cents Savings Bank* v. *Assessors of Boston*, 313 Mass. 762, 767.

The requirement of due process is that, after such notice as may be appropriate, the taxpayer have an opportunity to be heard as to the validity of a tax and the amount thereof by giving him the right to appear for that purpose at some stage of the proceedings before the tax is irrevocably fixed. *McGregor* v. *Hogan*, 263 U. S. 234, 237. As previously stated in Massachusetts, several remedies are available to a taxpayer whose complaint is that a tax is wholly illegal (*Wynn* v. *Assessors of Boston*, 281 Mass. 245, 248); but the exclusive remedy for overassessment is by application for abatement (*Lynch* v. *Boston*, 313 Mass. 478, 479; *Hairenik Association, Inc.* v. *Boston*, 313 Mass. 274, 278). Due process, therefore, requires that at some stage of the statutory proceeding for abatement the tax-

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payer have an opportunity to be heard in order to preserve his constitutional right to a hearing as to the amount of the tax. The requirement of due process is satisfied, however, if the statute providing for an ad valorem tax also provides for a hearing before the assessing board. *Pittsburgh, Cincinnati, Chicago, and St. Louis Railway Co.* v. *Backus*, 154 U. S. 421. Massachusetts statutes so provide. In *Assessors of Brookline* v. *Prudential Insurance Co.*, 310 Mass. 300, the Supreme Judicial Court of Massachusetts said, (p. 310):

> "We think that the statutes regulating proceedings for abatement of taxes are to be construed as contemplating hearings before the assessors upon applications for abatement."

To the same effect is *Eastern Racing Association, Inc.* v. *Assessors of Revere*, 300 Mass. 578. In that case, the petitioner argued that the only question for determination was whether the provisions of Mass. G.L. (Ter. Ed.) c. 58A, s. 6, as amended by Mass. St. 1933, c. 167, s. 4, relieved the Assessors of Revere of the duties laid upon them by Mass. G.L. (Ter. Ed.) c. 59. 300 Mass. 578, 580. It was held (p. 581):

> "• • • the provisions of G. L. (Ter Ed.) c. 58A, as amended, were not intended to relieve the commissioner and board of assessors from the duties imposed upon them by G. L. (Ter Ed.) c. 59, as amended, in the matter of entertaining, hearing and deciding applications for abatement of taxes filed with them in due course, and that under the first statute referred to it was not contemplated that boards of assessors would not ordinarily perform these duties within the time fixed by law."

The *Eastern Racing Association* case was decided on June 28, 1938. St. 1938, c. 478, was not enacted until July 1, 1938. That case is, therefore, not authority for the proposition that a writ of mandamus would not issue since

the enactment of St. 1938, c. 478. Although the present appellant filed applications for abatement with the Assessors of Lowell for the years 1938 and 1939, there is no evidence that it made any effort to get a hearing before the Assessors. If, as the appellant contends, the appellate remedy provided by St. 1938, c. 478, is not constitutionally adequate, a petition for a writ of mandamus plainly would lie but the appellant did not see fit to file such a petition. Rather, the appellant slept upon its alleged constitutional rights until it filed its answer in the Land Court on January 26, 1945. (R., pp. 4-9.) If the appellant had petitioned for a writ of mandamus and the local assessors had in defense relied on St. 1938, c. 478, on the ground that it provided an adequate statutory remedy, plainly the constitutionality of St. 1938, c. 478, would have been directly in issue, and could have been brought ultimately to this Court upon appeal.

At the risk of being repetitious, we should like to call attention to still another case—*Harrington* v. *Glidden*, 179 Mass. 486. In that case the Court commenced its opinion by noting (p. 490) that in Massachusetts, assessors are public officers whose duties are of a *quasi* judicial nature, and then towards the end said (p. 495):

> "The defendant's brief contains an elaborate argument in support of the proposition that our statutes relating to the assessment of taxes are unconstitutional because they do not give the party assessed opportunity to be heard. But he does have full opportunity to be heard before the assessing board, if he desires it, before the demand becomes conclusively established against him, and that is enough. Coley, Taxation, 361, 363, 364, and cases cited."

The judgment of the Massachusetts Court in that case was affirmed by this Court. *Glidden* v. *Harrington*, 189 U. S. 255.

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As previously stated, St. 1938, c. 478, imposed conditions merely upon appeals to the Appellate Tax Board, not upon abatement proceedings before the assessors. In view of the decision in *Glidden* v. *Harrington*, 189 U. S. 255, and the Massachusetts cases quoted, the statutory provisions for proceedings before the assessors are alone enough to satisfy the requirements of the Fourteenth Amendment. We, therefore, respectfully urge that insofar as the appeal now before this Court relates to St. 1938, c. 478, it presents no substantial Federal question, the requirements of the Fourteenth Amendment having been satisfied by these statutory provisions.

VIII

Appellee's motion to dismiss or affirm should be allowed insofar as the appeal relates to St. 1938, c. 478, because the Federal question involved is not substantial for that it has long been settled that there is nothing unconstitutional or even harsh in requiring a person assessed to pay a tax before litigating its legality or amount.

Appellant's claim that St. 1938, c. 478, violates its constitutional rights is untenable under *Tennessee* v. *Sneed*, 96 U. S. 69, and *Phillips* v. *Commissioner of Internal Revenue*, 283 U. S. 589.

In *Tennessee* v. *Sneed*, 96 U. S. 69, 75, it was said:

> "In revenue cases, whether arising upon its internal revenue laws or those providing for the collection of duties upon foreign imports, it (the United States) adopts the rule prescribed by the State of Tennessee. It requires the contestant to pay the amount as fixed by the government, and gives him power to sue the collector, and in such suit to test the legality of the tax. There is nothing illegal or even harsh in this. It is a wise and reasonable precaution for the security of the government. No government could exist that permitted the collection of its revenues to be delayed

by every litigious man or every embarrassed man, to whom delay was more important than the payment of costs."

In *Phillips* v. *Commissioner of Internal Revenue*, 283 U. S. 589, 599, this Court said:

> "It is argued that such review by the Board of Tax Appeals and Circuit Court of Appeals is constitutionally inadequate because of the conditions and limitations imposed. Specific objection is made to the provision that the collection will not be stayed while the case is pending before the Circuit Court of Appeals, unless a bond is filed. . . . As to the first of these objections, it has already been shown that the right of the United States to exact immediate payment and to relegate the taxpayer to a suit of recovery, is paramount. The privilege of delaying payment pending immediate judicial review, by filing a bond, was granted by the sovereign as a matter of grace solely for the convenience of the taxpayer. . . ."

The appellant in the case at bar apparently has sought to draw a fine line of distinction between the right of the Commonwealth of Massachusetts to refuse to stay collection of the tax and the right to make payment of the tax, or a part thereof, a condition precedent to an appeal to its Appellate Tax Board after adverse action by the assessors on an application for abatement. That the right to collection of the tax regardless of a pending appeal is permissible under the Constitution of the United States has long been established. *Cheatham* v. *United States*, 92 U. S. 85, 89. *Tennessee* v. *Sneed*, 96 U. S. 69, 75. *Springer* v. *United States*, 102 U. S. 586, 594.

On this point, the *Phillips* case said, at page 596:

> "Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judi-

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> cial determination of the liability is adequate. . . . Delay in the judicial determination of property rights is not uncommon when it is essential that government needs be immediately satisfied."

There can be no question but what the statute in the instant case afforded the taxpayer the right to a hearing before the valuation became final. It was said in *McGregor* v. *Hogan*, 263 U. S. 234 at 237:

> "It is not essential to due process of law that the taxpayer be given notice and hearing before the value of his property is originally assessed, it being sufficient if he is granted the right to be heard on the assessment before the valuation is finally determined."

It will be noted that the statute in the instant case provided for refund, with interest, to the taxpayer of the amount of over-assessment, if any. It is provided in Section 1 of the said statute as follows:

> "If upon hearing it appears that the complainant has complied with all applicable provisions of law and the appellate tax board finds that the complainant is duly entitled to an abatement, it may grant him such reasonable abatement as justice may require, and shall enter an order directing the treasurer of the town to refund said amount, if the tax sought to be abated has been paid, together with all charges and interest at five per cent on the amount of the abatement from the date of the payment of the tax. The board may make such order with respect to the payment of costs as justice may require."

Thus, even if it paid all the tax as assessed, before the appeal was entered in the Appellate Tax Board, the appellant was afforded full benefit of the ultimate determination of the amount of the tax. There can be no tenable distinction between the payment of the tax, even if there has been an overassessment followed by refund, and the neces-

sity of posting a bond as in the *Phillips* case and in the case of *Nickey* v. *Mississippi*, 292 U. S. 393.

In the *Nickey* case, it will be noted that the only opportunity for a contest on the tax afforded the taxpayer was as a defense to a proceeding to enforce the same and this was held to be no violation of the Fourteenth Amendment to the Constitution, even though it entailed a necessity of the taxpayer's filing a bond to lift an attachment upon his land.

The fallacy of any contention that the appellant had a right to appeal without paying the tax lies in the necessity for arguing that the taxpayer has a constitutional right to withhold payment of a tax until it has been finally adjudicated. That, as we have seen is contrary to long-established custom and law. It follows that in those situations where the governmental authority has for one reason or another refrained from pressing for immediate collection of the tax, the Legislature of Massachusetts can provide in any way it wishes as to how far it will allow a taxpayer who is immediately liable for taxes, to have them reviewed without being required to pay them in full. It may do this by allowing the taxpayer to have a review when only part of the tax has been paid; or when a certain amount has been paid; or by filing a bond for security. A plea of financial inability of the taxpayer to meet these conditions will not avail. In *McMillen* v. *Anderson*, 95 U. S. 37, the Court considered a statute of Louisiana which allowed the collector of taxes to seize property of a delinquent taxpayer. A judgment was rendered in favor of the collector and, on appeal to this Court, counsel for the taxpayer argued as follows, (page 40):

> "The plaintiff (taxpayer) was not permitted under the law of Louisiana to contest the claim of the State, until he had given security for the payment of costs and penalties, as a condition for having a hearing. The law, therefore, establishes one rule for the rich and

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another for the poor. He who has neither wealth, nor wealthy friends to become his sureties, is not allowed a hearing under any circumstances. This is not due process of law."

The Court affirmed the judgment for the defendant, and in its opinion said, (page 41):

"Looking at the Louisiana statute here assailed—the act of March 14, 1873,—we feel bound to say, that, if it is void on the ground assumed, the revenue laws of nearly all the States will be found void for the same reason. The mode of assessing taxes in the States by the Federal Government, and by all governments, is necessarily summary, that it may be speedy and effectual. By summary is not meant arbitrary, or unequal, or illegal. It must, under our Constitution, be lawfully done.

"But that does not mean, nor does the phrase 'due process of law' mean, by a judicial proceeding. The nation from whom we inherit the phrase 'due process of law' has never relied upon the courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation. . . .

"Here is a notice that the party is assessed, by the proper officer, for a given sum as a tax of a certain kind, and ten days' time given him to pay it. Is not this a legal mode of proceeding? It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present, or had an opportunity to be present, in some tribunal when he was assessed. But this is not, and never has been, considered necessary to the validity of a tax. And the fact that most of the States now have boards of revisers of tax assessments does not prove that taxes levied without them are void."

The Court in the above case further held that whether or not other means were open to the taxpayer to contest

the tax, the remedy of injunction as invoked by the taxpayer was sufficient. It then said:

> "But it is said that this is not due course of law, because the judge granting the injunction is required to take security of the applicant, and that no remedial process can be within the meaning of the Constitution which requires such a bond as a condition precedent to its issue."
>
> "It can hardly be necessary to answer an argument which excludes from the definition of due process of law all that numerous class of remedies in which, by the rules of the court or by Legislative provisions, a party invoking the powers of a court of justice is required to give that security which is necessary to prevent its process from being used to work gross injustice to another."

It will be noted that in the above case the taxpayer became liable for *double the amount of the tax and costs.*

The taxes of the appellant in the case at bar were, at the time of its appeals to the Appellate Tax Board, presently due and payable, and it was the duty of those in charge of its affairs to pay them. It could hardly be said that the appellant had any constitutional right not to pay the taxes. Nor did it have a right to a final determination of the amount of the taxes before being required to pay them. Therefore, St. 1938, c. 478, by making the payment of all or part of each tax a condition precedent to the obtaining of a review by that Board, did not deprive the appellant of any constitutional right.

In view of the various cases hereinbefore cited, which, we submit, have established the constitutional right of a state legislature to require a person assessed to pay a tax before litigating its legality or amount, we respectfully urge that St. 1938, c. 478, presents no substantial Federal question.

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Conclusion

For the various reasons set forth above, it is submitted that appellee's motion to dismiss or affirm should be allowed with costs to the appellee.

Respectfully submitted,

CITY OF LOWELL,
By P. HAROLD READY,
City Solicitor,
and
RAYMOND D. O'BRIEN,
Attorney.

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Supreme Court of the United States

October Term, 1947.

No. 449.

MARDEN & MURPHY, INC.,
Petitioner,

vs.

CITY OF LOWELL,
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

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Lowell, Massachusetts,
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LAWYERS' BRIEF & PUBLISHING CO.
BOSTON, MASS.

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October Term, 1947.

No. 449.

MARDEN & MURPHY, INC.,
Petitioner,

vs.

CITY OF LOWELL,
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the Supreme Judicial Court of Massachusetts is reported in Massachusetts advance sheets 1947, Page 927. Copy of said opinion is filed in the record on appeal of this case in this Court (R. 282).

The decision of the Land Court is found in the record herein on appeal (R. 13-45).

Jurisdiction.

The jurisdiction of this Honorable Court is invoked under U. S. C., Title 28, Section 344 (b).

Statement of the Case.

Believing that the facts in the case as stated by the petitioner do not throw sufficient light on certain characteristics of the land and buildings involved in this proceeding, the respondent herein submits the following short statement in order that this court may be afforded a clear view of the situation confronting the Assessors of Lowell.

Previous to the time of the conveyance by the petitioner to Hamilton Company in 1933 (Ex. 26; R. 70) there was remaining in the petitioner, of the original mill site owned by it and situated northerly of Jackson Street, approximately 176,417 square feet of land. After the said conveyance, which split into two parcels the remaining land of the petitioner, there then remained the land which is now Parcels 1 and 2 in this petition. On Parcel 1 stands a valuable mill building commonly known and assessed as Mill #7 (R. p. 25).

The said deed to the Hamilton Company attempted to concentrate in the land so conveyed, all the water power which had been appurtenant prior thereto, to the entire tract. However, the water system for the generation of power remained in the same location as before the conveyance. Part of this system, to wit, a water wheel in use or usable at all times (R. 25) remained in the said Mill #7 building located on Parcel 1 and also a substantial part of the raceways and wasteways for the water which turned the said wheel ran under Mill #7. The conveyance to the Hamilton Company granted it the right and easement for the use of the said raceways and wasteways but the petitioner was at all times owner of the fee in all the land comprising Parcel 1.

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Argument.

1. The Petition Should Not be Granted as to Question (a) Involving the Constitutionality of Massachusetts Statute, St. 1938, c. 478.

The provisions of Statute 1938, C. 478, to which the petitioner objects are those which require the payment of the tax or one-half thereof (approximately) in certain cases before a taxpayer may appeal to the Appellate Tax Board for a revision of the tax. Respondent submits that the right of the legislature of a state to make such a provision has been decided by this Court, and by the weight of decisions of the Highest Courts of other States.

In *Williams vs. Board of Supervisors of the County of Albany*, 21 Fed. Rep. 99, the Circuit Court for the Northern District of New York considered an Act of the New York legislature validating certain illegal assessments made upon shareholders of the National Albany Exchange Bank, and providing for the method by which the taxpayer would be granted a hearing on the tax, before the assessors, for reduction or cancellation of the assessment. That Court, in finding the act *valid*, said, at p. 101:

> "The only objection to the validating act, which seems to deserve consideration, is found in the circumstance that the tax-payers have not been given an opportunity to be heard until after they were compelled to pay their taxes . . . If, therefore, it was within the competency of the legislature to provide for the collection of a tax by a system which requires the tax-payers to pay in advance of an opportunity to be heard, but which permits them to have a subsequent hearing and to obtain restitution, if restitution ought to be made, the validating act was constitutional."

And at page 102:

> "It is asserted in many cases that notice and an opportunity for hearing of some description are matters of constitutional right; but it has nowhere been declared that it is indispensable that the hearing should be one in advance of the collection of the tax."

The above case came before this court on writ of error. *Williams vs. Supervisors of Albany,* 122 U. S. 154 (1887). This court found that there was no lack of due process of law and affirmed the judgment of the lower court. The court said at page 166:

> "Every right of the shareholder who had paid taxes on the assessment, and it does not appear that there were any others, was secured. He could present any claim he might have for a reduction or cancellation of the assessment, and be heard respecting it."

In *DePauw University vs. Brunk,* 53 Fed. 2nd 647, affirmed by 285 U. S. 527, (1932) the Court said, at p. 650:

> "So far as taxation is concerned due process of law is fully satisfied if at some stage in the proceeding the taxpayer has notice and opportunity to be heard. He may not have that opportunity until after the tax has been paid and he has brought suit to recover back, but, if he has it even then the due process provision is not violated."

In the case of *Matthew vs. Rodgers,* 284 U. S. 521 (1931) the Court denied relief by injunction to restrain the collection of a tax when a remedy existed under the laws of Mississippi whereby the taxpayer, upon payment of the tax, could maintain a suit at law for its recovery on the ground that it was exacted in violation of the Constitution of the United States. In support of this, the Court, at page 526, cited some seven of its decisions.

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That the right to collection of the tax regardless of a pending appeal by the taxpayer is permitted to the taxing authority without infringement of the rights of the taxpayer under the Constitution of the United States has long been established.

Cheatham vs. United States, 92 U. S. 85, 89 (1876).
Tennessee vs. Sneed, 96 U. S. 69, 75 (1877).
Springer vs. United States, 102 U. S. 586, 594 (1881).

Petitioner claims in his brief (page 27) that he was *denied* a hearing because of the requirements of payment contained in the attacked statute, with which he did not comply. Thus it is asking this Court to find, in effect, that a failure by a taxpayer, seeking to appeal his tax, to comply with the conditions precedent to such appeal, is tantamount to an absolute omission in the tax laws of provisions for an opportunity to be heard on the tax. There is no deprivation of constitutional rights by the setting of a condition precedent to a hearing when that condition is the filing of a bond by the taxpayer.

McMillen vs. Anderson, 95 U. S. 37 (1877).
Phillips vs. Commissioner of Internal Revenue, 283 U. S. 589 (1931).
Nickey vs. Mississippi, 292 U. S. 393 (1934).

Can it be then, that the fact that the condition precedent being the payment of the tax makes the statute unconstitutional? Payment of the tax is certainly a condition precedent, as it were, to an action to recover back an illegal tax. And this court, as shown above, has upheld that remedy as adequate protection to the taxpayer.

The petitioner further objects to the instant statute because it is one in which the requirement as to payment is

affirmatively provided therein. Wherefore lies the distinction between such tax laws, containing refund provisions, which affirmatively require the payment of the tax before hearing, and tax laws which effectually require the same? In either case the taxpayer is afforded opportunity for hearing before the tax is finally established against him and therein lies the fulfillment of the guarantees of the 14th amendment.

McGregor vs. Hogan, 236 U. S. 234, 237 (1923).

It will be noted that the statute in the instant case provides for refund, *with interest*, to the taxpayer of the amount of over-assessment, if any. It is provided in Section 1 of the said statute as follows:

> "If upon hearing it appears that the complainant has complied with all applicable provisions of law and the appellate tax board finds that the complainant is duly entitled to an abatement, it may grant him such reasonable abatement as justice may require, and shall enter an order directing the treasurer of the town to refund said amount, if the tax sought to be abated has been paid, together with all charges and interest at five per cent on the amount of the abatement from the date of the payment of the tax. The board may make such order with respect to the payment of costs as justice may require."

Thus, even if he paid all the tax as assessed, before the appeal was entered in the Appellate Tax Board, the petitioner was afforded full benefit of the ultimate determination of the amount of the tax.

Respondent submits that there can be no tenable distinction between legislation setting the condition of payment of a tax prior to hearing thereon, that condition being affirmatively expressed in the statute, and legislation containing the affirmatively expressed condition as to the posting of a bond. Neither can there be a tenable distinc-

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tion between the necessity of prepayment such as required by the instant statute and the necessarily same obligation precedent to a suit for recovery of a tax.

The constitutionality of legislation analogous to Massachusetts Statute 1938, c. 478, requiring payment of the tax as a condition precedent to hearing on its validity or amount has been upheld in other jurisdictions. Cooley on Taxation, 4th Ed., Sec. 143. In *Morrison-Knudson Co., Inc. vs. State Board of Equalization of Wyoming*, 35 Fed. Supp. 553, we find a significant statement by the Court, at p. 556:

> "The principle of law involved seems to be the question of constitutional due process. Here, a hearing is afforded only in the event the taxpayer pays the tax, which in itself is not unusual or unconstitutional * * *."

In that case the Court found the Wyoming legislation unconstitutional for reasons not applicable to the Act involved in the case at bar.

For decisions of state courts upholding the provisions of prepayment akin to the Massachusetts provisions, the attention of this Court is respectfully directed to the following:

Richford Savings Bank & Trust Co. vs Thomas, 111 Vt. 393.
Exchange Oil Co. vs. State, 80 Okla. 52.
Eddy vs. Township of Lee, 73 Mich. 123.

And for the same or similar effect, to the following:

Powell vs. Gleason, 50 Ariz. 542.
Fleming vs. Power, 77 S. C. 528.
Zimmerman vs. Corson County, 39 S. D. 167.
Fort vs. Dixie Oil Co., 170 Tenn. 183.
Wisconsin Real Estate Co. vs. Milwaukee, 151 Wis. 198.
Casco vs. Thurston County, 163 Wash. 666.
Ballard vs. Wooster, 182 Wash. 408.

The comprehensive and well considered opinions by Ronan J. in *Old Colony Railroad vs. Assessors of Boston*, 309 Mass. 439 and *Lincoln Hotel Company vs. Assessors of Boston*, 317 Mass. 505 will afford this Court an exhaustive study of the question here involved.

The taxes of the appellant in the case at bar were, at the time of its appeals to the Appellate Tax Board, presently due and payable, and it was the duty of those in charge of its affairs to pay them. It could hardly be said that the appellant had any constitutional right not to pay the taxes. Nor did it have a right to a final determination of the amount of the taxes before being required to pay them. Therefore, St. 1938, c. 478, by making the payment of all or part of each tax (in certain instances) a condition precedent to the obtaining of a review by that Board, did not deprive the appellant of any constitutional right.

In view of the various cases hereinbefore cited, which, we submit, have established the constitutional right of a state legislature to require a person assessed to pay a tax before litigating its legality or amount, we respectfully urge that St. 1938, c. 478, presents no substantial Federal question.

Furthermore, it is established that one who assails a statute as unconstitutional must show that he is injuriously affected thereby.

> *Mallinckrodt Works vs. St. Louis*, 238 U. S. 41.
> *Plymouth Coal Co. vs. Pennsylvania*, 232 U. S. 531, 544.

The decision of the Land Court held that the petitioner was not unable to comply with the provisions of the statute as to payment. That decision read in part as follows:

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"Thus the evidence which was introduced tending to prove that Marden & Murphy, Inc. was unable to comply with the provisions of St. 1938, c. 478, s. 3 as to payment is immaterial. If it should be material, however, it cannot be found as a fact on all the evidence that Marden & Murphy, Inc. was unable to comply with the provisions of said statute as to payment. Exhibits 89 and 90 are statements of condition of Marden & Murphy, Inc. for various months in 1938, 1939 and 1940. An examination of these statements discloses that from the cash on hand alone, without considering the other assets of the corporation, the provisions of the statute in regard to payment as to parcels 2 and 3 could have been complied with, and that from the other assets of the corporation arrangements might have been made to secure the necessary money to comply with the provisions of the statute in regard to payment as to parcel 1" (R., pp. 29, 30).

Under the circumstances, we suggest, the appellant has not shown that it has been injuriously affected by the conditions as to payment imposed by St. 1938, c. 478.

2. The Petition Should Not Be Granted as to Questions (b) and (c) Involving the Opportunities Afforded a Taxpayer to Contest His Tax.

Petitioner questions the right of Massachusetts to regulate the manner in which a tax shall be contested as to overassessment, and couples the ruling of the Massachusetts Courts in the instant case that proceedings for abatement are the only remedy available; to the necessity for payment of the tax before abatement proceedings can be had. In his brief (Page 30) petitioner refers this Court to the authorities and arguments set out in the preceding division of his brief.

As to the cases cited to the effect that the taxpayer has a right to a hearing before the tax levied upon him becomes

established the respondent has no quarrel with that general principle which they support. However, petitioner further claims that the taxpayer is entitled to have questions of law passed on by a judicial tribunal, and to support this, cites *Ohio Valley Water Company vs. Ben Avon Borough*, 253 U. S. 287 and *Wadley Southern Railway vs. Georgia*, 235 U. S. 651.

In the *Ohio Valley Water Co.* case, which was a utility rate case, this Court said:

> "In all such cases, if the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to other law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment."

The case at bar concerns the ordinary annual tax upon real estate, not the rates of a utility company. When this class of taxes has been involved, the proceedings have been construed with the utmost liberality and have been held to violate the Fourteenth Amendment only where they are arbitrary, oppressive or unjust.

> *Glidden vs. Harrington*, 189 U. S. 255, 258.
> *Missouri Pacific Railroad Co. vs. Western Crawford Road Improvement District*, 266 U. S. 187.

The *Wadley* case involved the regulation of carriers and is likewise outside the scope of the principles of law relating to taxation. Due process of law does not require a judicial hearing on a tax. A hearing before an administrative body is sufficient.

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Palmer vs. McMahon, 133 U. S. 660. (1890)
Pittsburg etc. Railway vs. Backus, 154 U. S. 421. (1894)
De Pauw University vs. Brunk, 285 U. S. 527, affirming 53 F. 2nd 647 (1932)

In support of his statement that having claimed a violation of constitutional rights, he is entitled to a review of both law and facts by some tribunal other than the board which levied the assessment, the petitioner cites *Chicago, Burlington and Quincy Railroad vs. Osborne*, 265 U. S. 14 and *Londoner vs. Denver*, 210 U. S. 373. The *Osborne* case was distinguished by the respondent herein in the proceedings on appeal in this case, (Statement Opposing Jurisdiction, pp. 7-8) and will not be dwelt on further here except to point out that the question presented in that case is not analogous to that in the case at bar.

Londoner vs. Denver does not militate against the situation presented in the instant case. In that case the taxpayer was afforded only the right to submit his objections to the tax in writing and had no opportunity whatever "to support his allegations by argument however brief, and, if need be, by proof, however informal." (p. 386.) It will be noted that in that case the taxpayer's only resort was to the board of equalization and that board provided *no method of hearing whatever* other than the said written submission of his objections. In the instant case opportunity for a full and ample hearing was afforded the taxpayer.

The assessment of water power to the petitioner was established by the Land Court as, at most, an overvaluation of his premises (R. p. 26). It was found that water power was not separately assessed but was assessed merely as an

enhancement of the value of petitioner's land. This reduction by the court of a claimed invalidity in the assessment, to a matter of possible overvaluation was purely a matter of local law. The finding by the Land Court and the Supreme Judicial Court that the petitioner's exclusive remedy therefor was by abatement proceedings raised no Federal question.

Northern Pacific Railroad Company vs. Patterson, 154 U. S. 130. (1894).
Mellon Company vs. McCafferty, 239 U. S. 134 (1915)

Thus the record in this case at bar is ample evidence that *invalidities* in the assessments may be raised, under Massachusetts law, by a taxpayer in resistance to the foreclosure of a tax lien and, consequently, when the petitioner claims that under the said Massachusetts law his only remedy for invalid assessments lay in abatement proceedings, he is including *invalidities* under the local rule which in fact applies only to *overvaluation*. While invalidities in an assessment may be raised in abatement proceedings, that remedy is not exclusive. Petitioner shows recognition of this fact in his argument in his brief (Page 38) and yet his statement of questions presented (Petition p. 13), questions (b) and (c) refer to "validity or amount" of the assessments.

When petitioner says that he was *denied* a hearing as to the amount of the assessments he is of course assuming that he was entitled to a hearing before the Appellate Tax Board without complying with the conditions required by the statute regulating such appeals. That he was not so entitled, the respondent respectfully submits.

Not having prosecuted his appeal as to the taxes for the years 1938 and 1939, the petitioner has not pursued the

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remedies provided him before the board established by the laws of Massachusetts for that purpose. That he was obliged to pursue those remedies is well established. It was said by this Court in *First National Bank vs. Weld*, 264 U. S. 450 (1924) at 453:

> "We are met at the threshold of our consideration of the case with the contention that the plaintiff did not exhaust its remedies before the administrative boards and consequently cannot be heard by a judicial tribunal to assert the invalidity of the tax. We are of the opinion that this contention must be upheld."

3. The Petition Should Not be Granted as to Questions (d) and (e) Involving the Assessment of Petitioner's Property.

In approaching the question of the alleged discrimination by the Assessors of Lowell in their valuation of petitioner's land, the Court's attention is respectfully directed to the decision of the Land Court, in that part thereof where the evidence on this point is reviewed. It reads as follows, (R. p. 24):

> "The evidence discloses that in the City of Lowell land without water power is assessed at a certain value; that when land is with water power, a value is added to said land; that twenty cents a square foot was added to the value of the land of Marden & Murphy, Inc. before the above-mentioned conveyance to the Hamilton Company, and the same amount was added to the value of both the land of Marden & Murphy, Inc. and the Hamilton Company after said conveyance; that the land in question was assessed at this figure despite the fact that the Board of Assessors knew of the conveyance to the Hamilton Company by which Marden & Murphy, Inc. had conveyed its water power, *among other reasons because there was still a water wheel in the Mill No. 7 building, and because by a decision of the Board of Tax Appeals made in 1931 involving Marden & Murphy, Inc. and the land in ques-*

> *tion in this case and other land, the value for said land was established at about seventy-five cents a square foot and there was a finding in said decision that water power added nothing to the land.*" (Italics supplied.)

Before commenting on the significance of that part of the above excerpt which petitioner has emphasized, it might be well to point out that where the Court said: "and the same amount was added to the value of both the land of Marden & Murphy, Inc. and the Hamilton Company after said conveyance * * *" it was the Court's way of saying that the valuation remained unchanged. This is amply borne out by the record and by petitioner's brief (p. 31) and is mentioned here simply to avoid the possible implication that there was any *additional* valuation assessed following the conveyance. No other inference is intended to be drawn here by the respondent.

The petitioner says in his brief, (p. 31):

> "Here the Assessors did not in any true sense make an assessment or valuation of petitioner's land. What they called their 'assessed value' in this case is made up of (a) their estimate of the value of petitioner's land plus (b) a further amount representing what they deemed to be the value of another asset which they were fully aware belonged wholly to someone else."

Respondent submits that the above, which is the basis for petitioner's claim of discrimination," is not borne out by the record. It implies that the Assessors included in the assessment to the petitioner something which they knew that they had *no right* to assess to him and that by that inclusion, they arrived at a figure for the square foot value of the land which was in excess of their valuation of the land without the inclusion. That this implication is faulty in two counts is evidenced by the portion of the

Land Court decision above quoted. First because of the presence of the water wheel in the building located on Parcel 1, which wheel was usable at all times, the petitioner being the owner of the fee in the land and building. (R. p. 25) This was one of the reasons disclosed by the evidence why the assessors placed upon the land the valuation that they did. If the continued presence of the water wheel, whether used or not, (petitioner does not claim it was not) justified the assessors under local law in continuing their assessment of Parcel 1 as land "with water power", then the petitioner has no cause for complaint here. The Land Court did not pass upon this point. It will be noted that only in the case of Parcel 1 does the assessors' valuation list mention water power. (R. pp. 17-19) The claim of the petitioner that it was likewise assessed for water power in Parcel 2 rests fundamentally upon implication from the fact that the assessed value of the land comprising Parcel 2 was the same before and after the conveyance to the Hamilton Company. The second count is that there was evidence that the assessors relied upon a decision of the Board of Tax Appeals made in 1931 which placed the value of the land in question in this case at about seventy-five cents a square foot and included a finding that water power added nothing to the value of the land. (R. Evid. pp. 120, 129-130).

By whatever method the assessors arrived at the figure of twenty cents per foot as the value of water power when it made its assessment on the mill site prior to the conveyance to the Hamilton Company of the water power and part of the land, it is not without reason that the finding of the board charged with review of such assessments, to the effect that water power added nothing to the value of the land, influenced the assessors in maintaining the same per

foot valuation after that conveyance both as to the land remaining to the petitioner and as to the land conveyed to the Hamilton Company. It is significant that neither the Land Court nor the Supreme Judicial Court has held that there was a *wrongful* inclusion of water power in the assessment following the said conveyance.

Thus we find that after the conveyance no mention was made of water power in the valuation list of the Assessors as to Parcel 2, while in the case of Parcel 1, it being the site of the building containing the water wheel and likewise the location of a considerable length of the raceways and wasteways going to make up the entire water power system, the assessment list continued to carry the words "with water power".

Overvaluation resulting from error of judgment will not support a claim of discrimination. There must be something that amounts to an intention, or the equivalent of fraudulent purpose, to disregard the fundamental principles of uniformity.

Rowley vs. Chicago & Northwestern Railway Company, 293 U. S. 102, 111 (1934).

Respondent submits that there is no evidence of discrimination shown by the petitioner.

Conclusion.

For the various reasons set forth above, it is submitted that the petition for a writ of certiorari should be denied with costs to the respondent.

Respectfully submitted,

P. HAROLD READY,
RAYMOND D. O'BRIEN,
Attorneys for Respondent.

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JANUARY 12, 1948.

Per Curiam Decision.

No. 449. MARDEN & MURPHY, INC. *v.* CITY OF LOWELL. Appeal from and petition for writ of certiorari to the Land Court of Massachusetts. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. The petition for writ of certiorari is denied. *Burton E. Eames* for appellant-petitioner. *P. Harold Ready* and *Raymond D. O'Brien* for appellee-respondent. Reported below: 74 N. E. 2d 666.